CLERK'S

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

THOMAS R. LOMBARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1933

CERTIORARI GRANTED NOVEMBER 6, 1933

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA CANAL ZONE.

UNITED STATES DISTRICT COURT IN AND FOR THE CANAL ZONE, BALBOA DIVISION.

THOMAS R. LOMBARD,
Libelant,
versus

THE MOTOR SHIP REAL, HER ENGINES, BOATS, BOILERS, TACKLE, APPAREL, FURNITURE, ETC., ETC., AND HANS ELLIOTT, OWNER OF SAID MOTOR SHIP REAL,
Respondents.

HANS ELLIOTT,
Cross-libelant,
versus

THE MOTOR VESSEL LUCKY GIRL, HER ENGINES, BOATS, TACKLE, APPAREL, FURNITURE, ETC.
Respondent.

No. 1028, IN ADMIRALTY.

DAMAGES FOR COLLISION.

Appearances:
Carlos Icaza A. and L. S. Carrington for libelant and cross-respondent.
Van Siclen & Boggs for respondents Cross-libelant.

2 PLACITA.

For August Term, 1930.

PLEAS before the Hon. James J. Lenihan, Judge of the District Court for the Canal Zone, at the August Term, 1930, for the Balboa Division, begun on the first Tuesday in August, being the fourth day of August, in the year of our Lord one thousand nine hundred and thirty.

Present: Hon. James J. Lenihan, Judge, presiding; J. J. McGuigan, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal and J. J. Walker Second Assistant Clerk of Court.

Attest:

(Signed) J. J. WALKER,
Second Assistant Clerk of Court.

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3 STIPULATION FOR COSTS.

(Filed August 9, 1930.)

United States of America Canal Zone in the United States District Court for the Canal Zone. Balboa Division.

In Admiralty No. 1028.

Thomas R. Lombard Libelant,

vs.

The Motor Ship "Real", her engines, boats, boilers, tackle, apparel, furniture, etc. etc. and Hans Elliot, Owner of said motor ship "Real", Respondents.

Stipulation for Costs.

Whereas, a Libel was filed in the above Court on the 9th day of August 1930 by Thomas R. Lombard against the M S "Real" and her Owner, Hans Elliot, in a cause of Collision, Civil and Martime, for the reasons and causes in the said Libel mentioned, and praying that a Monition may issue against the said M S "Real" and against the goods, chattels and effects of the said Hans Elliot:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the undersigned shall be, and is bound in the sum of $250.00, cash conditioned that the Libelant above named shall pay all such costs as shall be awarded against him by this Court, or in case of appeal by the Appellate Court.

(Signed) THOMAS R. LOMBARD,

Taken and acknowledged this 9th day of August 1930, before me,

(Signed) J. J. WALKER,
(Seal) Assistant Clerk of the Court.

Above cash collateral of $250.00 received this 9th day of August, 1930.

(Signed) J. J. WALKER,
Assistant Clerk.

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4 LIBEL.

(Filed August 9, 1930.)

(Title Omitted.)

To the Honorable James J. Lenihan, United States District Judge for the Canal Zone:

The Libel of Thomas R. Lombard, Owner of the Motor Ship (Lucky Girl) and a sand barge, against

the Motor Ship ("Real"), her engines, boats, boilers, tackle, apparel, furniture etc., etc., and against Hans Elliot, Owner of the Motor Ship ("Real") in a Cause of collision, Civil and Martime, alleges as follows:

First: That at all times hereinafter mentioned the libelant, Thomas R. Lombard, was the owner and operator of the Motor Ship "Lucky Girl" and of a certain sand barge, which up to the time of the collision hereinafter set forth, was tight, staunch, sound, strong, properly manned and in all respects seaworthy.

Second: That the respondent, Hans Elliot, was at all times hereinafter mentioned, and now is the owner and operator of the Motor Ship "Real", her engines, boats, boilers, tackle, etc.

Third: That at or about 2:45 o'clock in the morning of July 31, 1930, the Motor Ship "Lucky Girl" with a sand barge in tow, attached to her starboard side and fully loaded, and the Motor Ship "Real" were in collision in Balboa Harbor at a point between Buoy 9 and 11 by reason of which said collision the sand barge tow was damaged so severely that it sank within five minutes after said collision.

Fourth: Upon information and belief, the libelant alleges that the following are the facts and circumstances of the collision: On the day above named the M. S. "Lucky Girl" with a sand barge attached was on a voyage from Chame, Province of Panama, Republic of Panama, to the Port of Balboa, Canal Zone. She had come up along the coast and was proceeding up the Channel. The sea was calm and the morning was clear. There was flood tide and visibility at time of collision was good, and the Harbor and Channel lights were all burning. The dredge "Las

Cruces" was anchored on the starboard side of the course of the "Lucky Girl" and the "Lucky Girl" kept to the center of the Channel. About five minutes prior to the collision the tug "Chagres" came from Balboa Harbor in the center of the Channel with a tow, and sighting the "Lucky Girl" she gave two blasts with her whistle indicating that the "Lucky Girl" must keep to port. The "Lucky Girl" immediately starboarded her helm and went to the left side of the Channel about 50 feet outside of the Channel. Whilst on this course the "Real" was cited by those on board the "Lucky Girl" about half a mile away traveling in the opposite direction. Her green light and mast-head light were plainly visible off the starboard bow of the "Lucky Girl" indicating that she was passing green to green on the starboard side. The "Lucky Girl" continued on her course traveling from buoy light to buoy light. When the "Lucky Girl" was about 60 feet from the "Real" said "Real" suddenly changed her course to starboard and started across the bow of the "Lucky Girl" showing her red light. Seeing collision imminent the watch on the barge attached to the "Lucky Girl" shouted to those on board the "Real" and the Master of the "Lucky Girl" immediately reversed his engines full speed astern. Despite the efforts of the officers and crew of the "Lucky Girl" to avoid the collision, the "Real" persisted on her course across the bow of the "Lucky Girl"; she bore down on the "Lucky Girl" and struck the barge attached to the "Lucky Girl" about one quarter from her starboard bow with such force and violence that a large hole was opened on her starboard side and she sank with her full cargo of sand in less than five minutes. The "Real" at this time was headed in a south-westerly direction towards the shallow water outside of the channel and at an angle of about 45 degrees to the "Lucky Girl".

Fifth: At the time of the collision the "Lucky Girl" was being carefully navigated and managed and was observing all the Rules and Regulations required of a vessel in her situation.

Sixth: Said collision and consequent loss of the sand barge were not caused by any fault on the part of the "Lucky Girl" or those in charge of her and the barge, but was due solely to the fault and negligence of the "Real" and those in charge of her in the following respects:

(1) It was the duty of the "Real" to pass the "Lucky Girl" green to green or starboard to starboard and she failed so to do.

(2) She altered her course and tried to cross the bow of the "Lucky Girl" without cause or justification and contrary to the rule of the road.

(3) The officers on board of the "Real" failed to see that the "Lucky Girl" had a barge in tow and should have kept clear of her.

(4) She gave no signal or alarm to the "Lucky Girl" of her intention to change her course.

(5) She failed to navigate in accordance with the rule of the road and of a vessel in her situation.

(6) She was not in charge of a competent person attending to his business.

(7) The Master was not at the helm as required by the Rule and Regulations of the Panama Canal.

(8) She was not licensed to navigate in the Canal Zone waters.

7 (9) She failed to have a look-out properly stationed and attending to his duties.

(10) She failed to make any or proper efforts to avoid the collision.

(11) She failed to reverse her engines when danger was imminent.

(12) That respondents were negligent in other and further respects, and libelant begs leave to offer proof thereof as and when advised and to amend this libel accordingly.

Seventh: By reason of the aforesaid collision the sand barge sank and was totally lost with a cargo of sand and machinery and the libelant has been damaged as follows:

(a)	Cost of barge	$10,300.00
(b)	Cost of Sand on board, ...	125.00
(c)	Cost of one drum of gasoline	13.00
(d)	Cost of repairs to machinery ..	2,000.00
	Total	$12,438.00

Eighth: That the libelant herein was engaged in the business of transporting sand in said barge from different parts of the Republic to Balboa and was selling same to constructors of buildings in Panama and was earning a profit of $1,000 per month, and that he will be deprived of said earnings for a period of at least two months or a total of $2,000.00 to his damage.

Ninth: That libelant has been damaged in the sum of $14,438.00.

Tenth: That said M S "Real" is now or soon will be within the waters of the Canal Zone.

Eleventh: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of this Honorable Court.

Wherefore, your libelant prays that a citation according to the course and practice of this Honorable Court in cases of Admiralty and Maritime Jurisdiction may issue against the respondent M S "Real", her engines, boats, boilers, tackle, apparel, furniture, etc., etc., and against Hans Elliot and all persons having or claiming to have any interest in or to said vessel, may be cited to appear and answer under oath all and singular the matters aforesaid; that this Honorable Court may be pleased to decree the libelant the damages aforesaid with interests and costs of suit and that Hans Elliot may be decreed to pay the same, and that said M S "Real", her engines, etc. may be condemned to pay the same, and that if the respondent, Hans Elliot, cannot be found within the jurisdiction of this Court, that an attachment may issue against his goods and chattels to the amount sued for and that if none be found or insufficient be found his credits and effects now in the hands of or which may come into the hands of Captain Charles Svennsson personally or as agent, Balboa, Canal Zone, be attached and garnisheed, and that the said Captain Charles Svennsson be summoned to appear and answer under oath as to all such effects and credits, and that libelant have such other and further relief in the premises as in Law and Justice may be entitled to.

(Signed) CARLOS ICAZA A. &
L. S. CARRINGTON,
Proctors for Libelant.

United States of America,
Canal Zone. ss.

Thomas R. Lombard, after being duly sworn deposes and says: That he is the libelant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to these matters he believes it to be true.

That the source of deponent's information and the grounds of his belief as to all matters not stated in the libel to be alleged upon his own knowledge, are reports made to him by employees of the M S "Lucky Girl".

(Signed) THOS. R. LOMBARD.

Subscribed and sworn to before me this 9th day of August, 1920.

(Signed) J. J. WALKER,
(Seal) Assistant Clerk of Court.

9

AFFIDAVIT.

(Filed August 9, 1930.)

United States of America,
Canal Zone. ss.

Thomas R. Lombard, after being duly sworn, deposes and says: that he is the libelant in the above entitled cause, that he has a good cause of action against the motor ship Real and against its owner, Hans Elliott; that he has filed a libel against the above named respondents claiming damages in the sum of $14,438.00 for loss of a sand barge and machinery caused by the negligence of the respondents herein on the morning of July 31, 1930; that the said Hans

Elliott is a non-resident of the Canal Zone and that the M S Real is not worth more than $5000.00; that upon information and belief there is due to the said Hans Elliott about $2000.00 which said amount will be paid to him by Captain Charles Svenson, of Balboa, Canal Zone, within a day or two; that if this amount be not attached in the hands of the said Captain Charles Svenson, the said Hans Elliott may remove same from the Canal Zone and from the Jurisdiction of this Court and the libelant will be defeated of his rights, as there is no more property in the Canal Zone belonging to the said Hans Elliott; to the best of affiant's knowledge and belief, that it is fit and proper that said sum of $2000.00 or any other credits in the hands of Captain Charles Svenson personally or as agent belonging to the said Hans Elliot should be attached to the extent of the amount sued for, or $14,438.00, and affiant prays the Court for an order to that effect.

(Signed) THOMAS R. LOMBARD.

Subscribed and sworn to before me this 9th day of August, 1930.

(Signed) J. J. WALKER,
(Seal) Asst. Clerk of the Court.

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10 ORDER.

(Filed August 9, 1930.)

It appearing to the satisfaction of the Court, from the libel herein filed that a sufficient cause of action exists against the above named respondents, and it further appearing from the affidavit of the libelant herein filed, that the respondent, Hans Elliott, is a non-resident of the Canal Zone and that there is proper in the Canal Zone which may be easily removed therefrom and from the jurisdiction of this Court, and it further appearing from said affidavit that the property

in the Canal Zone is not sufficient to pay the demand of the libelant, let monition and warrant of attachment issue as prayed for in the affidavit.

Done at Ancon, Canal Zone, this 9th day of August, 1930.

(Signed) JAMES J. LENIHAN, Judge.

11 MONITION.

(Issued August 9, 1930.)

The President of the United States of America to the Marshal of the Canal Zone, Greeting:

Whereas, a libel in rem and personam hath been filed in the United States District Court for the Canal Zone on the 9th day of August 1930 by Thomas R. Lombard, libelant, against the Motor Ship "Real", her engines, boilers, tackle, etc., and against Hans Elliott for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Motor Ship "Real", her tackle, etc., may be cited in general and special to answer the premises and all proceedings being had that the said Motor Ship "Real" or vessel, her tackle, etc., may for the causes in the said libel mentioned be condemned and sold to pay the demands of the libelant.

You are therefore hereby commanded to attach the said ("Real") pr vessel, her tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the United States District Court of the Canal Zone, on the 4th day of September, 1930, at 9 o'clock in the forenoon of the same day, if the

same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter; then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent if he shall be found in your District, that he be and appear before the said District Court on the 4th day of September, 1930, at 9 o'clock in the forenoon at the United States Court Room in
12 the United States Court House at Ancon, Canal Zone then and there to answer the said libel, and to make his allegations in that behalf; and we hereby further empower and strictly charge and command you, the said Marshal that if the respondent, Hans Elliott, cannot be found in your District, that you attach the goods and chattels of said respondent to the amount of $14,438.00, and if same cannot be found then you attach the credits and effects of said respondent in the hands of Captain Charles Svennsson, Balboa, Canal Zone, Garnishee named in the libel to the amount sued for; and that you summon the said Captain Charles Svennsson to appear and answer as Garnishee on the 4th day of September, 1930, in the United States District Court, at Ancon, Canal Zone, as to all moneys which may come into his possession for the respondent from the date of the service of this process; and have you then and there this Writ, with your return thereon.

Witness, the Honorable James J. Lenihan, Judge of said Court, this 9th day of August, in the year of Our Lord, One thousand and Nine Hundred and Thirty.

F. H. SHEIBLEY, Clerk,

By (Signed) J. J. WALKER,
(Seal) 1st Asst. Clerk.

(Signed) CARLOS ICAZA &
L. S. CARRINGTON,
Proctors for Libelant.

MARSHAL'S RETURN.

(Filed August 12, 1930.)

The within Monition came into my hands for service August 9, 1930, and on said date, at 9.35 A. M., I served the same by offering to read the same to A. Ekstrand, Master of the Motorship, "Real", at Balboa in The Canal Zone, which reading was waived; and by delivering to him a true copy thereof together with a copy each of the Libel for Collision and Stipulation for Costs; the said vessel being at the time in Canal Zone waters alongside at Pier 18, Balboa, Canal Zone I took the said Motorship "Real", her engines, tackle, etc., into my official custody and im-
13 mediately thereafter served Notice of Arrest upon Captain Charles Svensson, Assistant Captain of The Port of Balboa, Canal Zone; a copy of said Notice is attached and made a part of this Return; and by publishing the Citation in the Star & Herald, and posting a copy of same at each of the following places within The Balboa Division: Court House, Ancon; Post Office, Ancon; Post Office Balboa Heights, as required by law.

In further obedience to said Order of the Court of said date, I, at 3.45 P. M. on August 9, 1930, served Notice of Garnishee upon Captain Charles Svensson; copy of said Notice being attached and made a part of this Return.

A copy of the above mentioned Citation is also attached and made a part of this Return.

JOHN T. BARRETT,
Marshal of the Canal Zone,
By (Signed) CHARLES L. PARKER,
Deputy Marshal.

Fees.

Service	$7.00
Mileage	.80
Posting Notices	.90
Publishing Notices	.30
Mileage Notices (2nd trip)	.60
	$9.60
Publication, Star & Herald	$8.15
Total	$17.75

Ancon, C. Z., August 12, 1930.

14 (Title Omitted.)

To the Captain of the Port,
Balboa, Canal Zone.

Sir:

Pursuant to a libel filed in the District Court and a Monition issued thereon, I have this ninth day of August, 1930, attached and taken into my official custody the Motorship "Real", her engines, tackle, etc.

You are hereby notified not to issue clearance or to undertake any interference in the present status of the above named vessel, except by order of the District Court, herein above mentioned, given through this office.

JOHN T. BARRETT,
Marshal of the Canal Zone.

By (Signed) CHARLES L. PARKER,
Deputy Marshal.

Served on:
(Sgd.) CHAS. SVENSSON,
August 9, 1930.

15 NOTICE TO GARNISHEE.

(Title Omitted.)

To Captain Charles Svennson, Balboa, Canal Zone:

Please take notice, that by virtue of a monition issued to me out of the United States District Court for the Canal Zone on the 9th day of August, 1930, in the above matter, all monies and other property now in your possession or which may hereafter come into your possession, for the use of and belonging to Hans Elliott, respondent herein, are attached until the further order of the Court; and you are further notified to be and appear before the Judge of the above Court on the 4th day of September, 1930, at 9 o'clock in the forenoon of said date, in the Court room of the Court house at Ancon, Canal Zone, and answer truthfully as to all property which may have come into your possession and which you now have belonging to said respondent, from the date of the service of this notice until the date of your appearance in Court.

Dated at Ancon, Canal Zone, this 9th day of August, 1930.

JOHN T. BARRETT,
United States Marshal for the
Canal Zone.

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16 CITATION.

(Title Omitted.)

Whereas, on the 9th day of August, 1930, a libel was filed in the District Court of the United States for the district of the Canal Zone, Balboa Division,

by Thomas R. Lombard against the motor ship Real her engines, boats, boilers, tackle, apparel, furniture, etc., etc., alleging in substance that said Real negligently rammed and sunk a certain sand barge owned by the libelant to his damages in the sum of $14,438 (fourteen thousand four hundred and thirty-eight dollars), and praying that the said vessel "Real", her engines, boilers, boats, equipment, etc., may be condemned and sold to pay the demand of the libelant, with interest, costs, and charges.

Now, therefore, in pursuance to the monition issued under the seal of said Court, to me directed and delivered, I do hereby give Public Notice to all persons claiming the said motor ship "Real", her engines, boilers, tackle, apparel, boats, furniture and equipment, or in any manner interested therein, that they are cited and admonished to appear before the said District Court, at a session to be held on Thursday, the 4th day of September, 1930, at nine o'clock in the forenoon of that day, provided the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose their claims and to make known their allegations in that behalf.

JOHN T. BARRETT,
Marshal,

By (Signed) CHARLES L. PARKER,
Deputy Marshal.

CARLOS ICAZA A. &
L. S. CARRINGTON,
Proctors for Libelant.

17 STIPULATION FOR COSTS BY CLAIMANT.

(Filed August 13, 1930.)

Stipulation for Claimants or Respondents costs, entered into pursuant to the rules and practice of this Court.

Whereas, a libel was filed in this Court on or about August, 9, 1930, by Thomas R. Lombard against the Motorship Real, her engines, boats, boilers, tackle, apparel, furniture, etc., for the reasons and causes in said libel mentioned and whereas a claim to the said Real has been filed by Hans Elliot, owner and claimant of the said Real, and files his claim thereto, and The United States Fidelity and Guaranty Co., Stipulator, parties hereto, hereby consenting and agreeing, that if said libelant recover costs, the decree therefore not exceeding the sum of two hundred and fifty dollars ($250.00) may be entered against them and each of their good, chattels, lands, tenements or other real estate.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the claimant herein and the United States Fidelity and Guaranty Company as surety, a surety company doing business in the Canal Zone, the stipulator, (undersigned) undersigned, shall be and each of them is hereby bound in the sum of two hundred and fifty dollars ($250.00), conditioned that they shall pay all costs and expenses which shall be awarded against the said M V Real, her engines, boats, boilers, tackle, apparel, furniture, etc., and Hans Elliot and for the

stipulator undersigned or any one of them by decree of this Court, and in case of appeal by any appellate Court.

M. V. REAL,
HANS ELLIOT,
By (Signed). H. ELLIOT,
HANS ELLIOT,
UNITED STATES FIDELITY AND GUARANTY COMPANY.
By (Signed) W. Y. BOYD,
(Seal) Its attorney.

Taken and acknowledged this 13th day of August, 1930.

(Signed) J. J. WALKER,
(Seal) Sec. Asst. Clerk of the Court.

18 United States of America,
District Court in and for ss.
The Canal Zone.

Hans Elliot owner of the M V Real and the United States Fidelity and Guaranty Company by its attorney, the above stipulators, after being duly sworn, each deposes and says, that the interests he represents is worth the sum of Two Hundred and Fifty Dollars ($250.00) over and above all debts and liabilities.

M V. REAL,
HANS ELLIOT,
By (Signed) H. ELLIOT,
HANS ELLIOT,
UNITED STATES FIDELITY AND GUARANTY COMPANY.
By (Signed) W. Y. BOYD,
(Seal) Its Attorney.

Sworn to before me this 13th day of August, 1930.

(Signed) J. J. WALKER,
(Seal) Sec. Asst. Clerk of Court.

19 CLAIM OF OWNER.

(Filed August 13, 1930.)

To the Honorable James J. Lenihan, Judge of the United States District Court for the District of the Canal Zone, Balboa Division:

Hans Elliot, owner of the motorship "Real", her engines, tackle, apparel, etc., intervening for his interest in the said property, appears before this Honorable Court and claims the said property and states that the said Hans Elliot, is the true and bona fide owner thereof, and that no other person or persons are the owners thereof.

And, thereupon, the said claimant prays that his Honorable Court will be pleased to decree a restitution of the aforesaid property to him, and otherwise right and justice to administer in the premises.

(Signed) H. ELLIOT.
HANS ELLIOT.

Subscribed and sworn to before me this 9th day of August, 1930.

(Signed) J. J. WALKER.
(Seal) Sec. Asst. Clerk of the District Court.

20 STIPULATION AND AMOUNT OF RELEASE BOND.

(Filed August 13, 1930.)

It is hereby stipulated that the Motorship Real now in the custody of the Marshal of the Canal Zone

under process issued in the above entitled action, may be released upon the filing oir behalf of said vessel of an Admirality Stipulation in the usual form, in the sum of Ten Thousand dollars, ($10,000).

(Signed) CARLOS ICAZA &
L. S. CARRINGTON,
Proctors for Libelant.
VAN SICLEN & BOGGS,
By (Signed) WM. A. VAN SICLEN,
Proctor for Motorship "Real"
& Hans Elliot.

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21 RELEASE BOND.

(Filed August 13, 1930.)

(Title Omitted.)

Entered into pursuant to the rules and practice of this Court.

Whereas, a libel was filed on the 9th day of August in the year of our Lord, One Thousand Nine Hundred and Thirty, by Thomas R. Lombard against the Motorship Real and Hans Elliot for the reasons and causes in the said libel mentioned; and, whereas, the Motorship Real is now in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas, the said Motorship Real has been claimed by Hans Elliot as Owner; and whereas it has been stipulated that said Motorship Real may be released from arrest upon the giving and filing of an Admiralty Stipulation in the sum of Ten Thousand Dollars, as appears from said stipulation now on file in said Court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or their surety, execution for the above amount may issue against their goods, chattels and lands.

Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Vansiclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the
22 Appellate Court if any appeal intervene, then this stipulation to be void otherwise to remain in full force and virtue.

(Signed) H. ELLIOT,
HANS ELLIOT.
(Signed) W. Y. BOYD,
(Seal) Attorney for the United States Fidelity & Guaranty Co.

Taken and acknowledged this 13th day of August, 1930, before me.

(Signed) J. J. WALKER,
(Seal) Sec. Asst. Clerk of the District Court, Balboa Djvision.

United States of America,
Canal Zone. ss.

Hans Elliot, owner of the Motorship Real and the attorney for the United States Fidelity & Guaranty Co., parties to the stipulation, being duly sworn depose and say, each for the interests he represents, that he the said company is worth the sum of Ten Thousand Dollars, over and above all his its debts and liabilities.

(Signed) H. ELLIOT,
HANS ELLIOT.
(Signed) W. Y. BOYD,
(Seal) Attorney for the United States Fidelity Guaranty Co.

Sworn to this 13th day of August, 1930, before me.
(Signed) J. J. WALKER,
(Seal) Sec. Asst. Clerk of the District Court.

Received this 13th day of August, 1930, 9:45 A. M. Vessel immediately released.
JOHN T. BARRETT,
Marshal,
By (Signed) CHARLES L. PARKER,
Deputy.

23 MOTION TO DISSOLVE ATTACHMENT.

(Filed August 15, 1930.)

Comes now the libelant above named by his proctors, Carlos Icaza and L. S. Carrington, and moves the Court to dissolve the attachment heretofore ordered on the credits and effects of the respondent, Hans Elliott, in the hands of Captain Charles Svennson, for the reason that since the issuing of said order, the respondent has given bond with an approved corporate surety, qualified to do business in the Canal Zone, as provided for in Rule 5 of the General Admiralty Rules of the Supreme Court of the United States.
(Signed) CARLOS ICAZA &
L. S. CARRINGTON,
Proctors for Libelant.

24 MINUTES OF AUGUST 16, 1930.

This cause coming on this day on libelant's motion to dissolve the attachment heretofore, on August 9, 1930, ordered on the credits and effects of the respondent, Hans Elliott, in the hands of Captain Charles

Svensson, Carlos Icaza and L. S. Carrington appearing for libelant, and Wm. A. Van Siclen of Van Siclen & Boggs appearing for respondent, and there being no objection thereto, the motion is allowed,

And it is ordered that the attachment be and is hereby dissolved as prayed for in libelant's motion.

25 PLACITA.

For September Term, 1930.

Pleas before the Hon. James J. Lenihan, Judge of the District Court for the Canal Zone, at the September Term, 1930, for the Balboa Division, begun on the first Tuesday in September, being the second day of September, in the year of our Lord one thousand nine hundred and thirty.

Present: Hon. James J. Lenihan, Judge, presiding; J. J. McGuigan, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal; and J. J. Walker, Second Assistant Clerk of Court.

Attest:

(Signed) J. J. WALKER,
Second Assistant Clerk of Court.

26 APPEARANCE.

(Filed September 4, 1930.)

Comes now Hans Elliot, Claimant-Respondent, by his Proctors Van Siclen & Boggs and appears in the above entitled action.

(Signed) VAN SICLEN & BOGGS,
Proctors for Claimant-Respondent.

EXCEPTIONS TO LIBEL.

(Filed September 17, 1930.)

The exception of Hans Elliot to the libel and complaint of Thomas R. Lombard against The Motorship Roal, her engines, tackle, apparel, etc., and Hans Elliot, alleges that the said libel is insufficient to the following particulars:

First: That the said libel fails to describe such "barge" as is alleged to have been sunk by respondent with that degree of certainty necessary to inform the claimant of its character whereon to predicate an intelligent answer.

Second: That neither the nationality of the libelant nor that of the vessel libeled is stated in the libel.

Third: That paragraph numbered "Fourth" is ambiguous and redundant and therefore cannot be intelligently answered by claimant.

Fourth: That sub-sections (1), (2), (5) and (10) of paragraph numbered "Sixth" are conclusions of the pleader.

Fifth: That sub-sections (6), (10) and (12) of paragraph numbered "Sixth" are scandalous and impertinent.

Wherefore, the Claimant-Respondent prays that the libel may be dismissed with costs.

VAN SICLEN & BOGGS,

By (Signed) WM. A. VAN SICLEN.

United States of America,
Canal Zone. ss.

On this 17th day of September, 1930, personally appeared before me, the undersigned authority, Wm. A. Van Sicklen, who after being duly sworn deposes and says: That I, Wm. A. Van Sicklen, am a member of the firm of Van Sicklen & Boggs, Esquires, proctors for Claimant-Respondent in the above entitled
28 cause; that I have read the foregoing exceptions to libelants libel and am of the opinion that such exceptions are well founded in law; that such exceptions are not interposed for delay.

(Signed) WM. A. VAN SICKLEN.
Proctor for Claimant-Respondent.

Sworn to and subscribed in my presence this 17th day of September, 1930, at Ancon, Canal Zone.

(Signed) J. J. WALKER,
(Seal) Assistant Clerk of Court.

29 MINUTES OF SEPTEMBER 27, 1930.

This cause coming on this day for argument on claimant respondent's exceptions to the libel, filed September 17, 1930, William A. Van Sicklen of Van Sicklen & Boggs appearing for claimant respondent and L. S. Carrington for libelant, the proctors for the parties make their arguments thereon, and the Court, after hearing the arguments of the proctors and being fully advised in the premises, finds that the first and second exceptions should be sustained and that the third, fourth and fifth exceptions should be overruled.

And it is ordered that the first and second exceptions are sustained and allowed, and that the third, fourth, and fifth exceptions are overruled and denied.

And it is further ordered that libelant be and he is hereby given until October 4, 1930, in which to amend his libel, and that claimant respondent be and he is hereby given ten days thereafter in which to plead or answer.

30 AMENDED LIBEL.

(Filed October 4, 1930.)

To the Honorable James J. Lenihan, United States District Judge for the Canal Zone:

Leave of the Court having been had and obtained to file the same, the amended libel of Thomas R. Lombard, owner of the Motor Ship "Lucky Girl", and a certain sand barge, against the Motor Ship "Real", her engines, boilers, boats, tackle, apparel, furniture, etc., and against Hans Elliott, owner of the Motor Ship "Real", in a cause of collision, Civil and Maritime, alleges as follows:

First: That at all times hereinafter mentioned the libelant, Thomas R. Lombard, a citizen of the United States of America, was the owner and operator of the Motor Ship "Lucky Girl", a vessel registered under the laws and flag of Panama, and of a certain sand barge, hereinafter described, which up to the time of the collision hereinafter set forth, was tight, staunch, sound, strong, properly manned and in all respects seaworthy.

Second: That the respondent, Hans Elliott, also a citizen of the United States was at all times hereinafter mentioned and now is the owner and operator of the Motor Ship "Real", a vessel registered under the laws and flag of Panama, her engines, boats, boilers, tackle, furniture, etc.

Third: That at or about 2:45 o'clock in the morning of July 31, 1930, the Motor Ship "Lucky Girl" with a sand barge in tow, attached to her starboard side and fully loaded, and the Motor Ship "Real" were in collision in Balboa Harbor at a point between Buoy 9 and 11 by reason of which said collision the sand barge tow was damaged so severely that it sank within five minutes after said collision.

Fourth: Upon information and belief, the libelant alleges that the following are the facts and circumstances of the collision:

3 On the day above named the M.-S. "Lucky Girl" with a sand barge attached was on a voyage from Chame, Provine of Panama, Republic of Panama, to the Port of Balboa, Canal Zone. She had come up along the Coast and was proceeding up the Channel of Balboa harbor towards Balboa docks. The sea was calm and the morning was clear. There was flood tide and visibility at time of collision was good, and the Harbor and Channel lights were all burning. The dredge "Las Cruces" was anchored in said Channel on the starboard side of the course of the "Lucky Girl" and the "Lucky Girl" kept to the center of the Channel. About five minutes prior to the collision the tug "Chagres" came from Balboa Harbor in the center of the Channel with a tow, and sighting the "Lucky Girl" she gave two blasts with her whistle indicating that the "Lucky Girl" must keep to port or left side. The "Lucky Girl" immediately starboarded her helm and went to the left side of the Channel about 50 feet outside of the Channel.

Whilst on this course the "Real" was sighted by those on board the "Lucky Girl" about half a mile away traveling in the opposite direction. Her green light and mast-head light were plainly visible off the starboard bow of the "Lucky Girl" indicating that she

was passing green to green on the starboard side. The "Lucky Girl" continued on her course traveling from buoy light to buoy light. When the "Lucky Girl" was about 60 feet from the "Real" said "Real" suddenly changed her course to starboard and started to cross the bow of the "Lucky Girl" showing her red light. Seeing collision imminent the watch on the barge attached to the "Lucky Girl" shouted to those on board the "Real" and the Master of the "Lucky Girl" immediately reversed his engines full speed astern. Despite the efforts of the officers and crew of the "Lucky Girl" to avoid the collision, the "Real" persisted on her course across the bow of the "Lucky Girl"; she bore down on the "Lucky Girl" and struck the barge attached to the "Lucky Girl" about one quarter from her starboard bow with such force and violence that a large hole was opened on her
32 starboard side and she sank with her full cargo of sand in less than five minutes. The "Real" at this time was headed in a south-westerly direction towards the shallow water outside of the channel and at an angle of about 45 degrees to the "Lucky Girl".

Fifth: At the time of the collision the "Lucky Girl" was being carefully navigated and managed and was observing all the Rules and Regulations required of a vessel in her situation.

Sixth: Said collision and consequent loss of the sand barge were not caused by any fault on the part of the "Lucky Girl" or those in charge of her and the barge, but was due solely to the fault and negligence of the "Real" and those in charge of her in the following respects:

(1) It was the duty of the "Real" to pass the "Lucky Girl" green to green or starboard to starboard and she failed so to do.

(2) She altered her course and tried to cross the bow of the "Lucky Girl" without cause or justification and was contrary to the rule of the road.

(3) The officers on board of the "Real" failed to see that the "Lucky Girl" had a barge in tow and should have kept clear of her.

(4) She gave no signal or alarm to the "Lucky Girl" of her intention to change her course.

(5) She failed to navigate in accordance with the rule of the road and of a vessel in her situation.

(6) She was not in charge of a competent person attending to his business.

(7) The Master was not at the helm as required by the rules and regulations of The Panama Canal.

(8) She was not licensed to navigate in the Canal Zone waters.

(9) She failed to have a look-out properly stationed and attending to his duties.

(10) She failed to make any or proper efforts to avoid the collision.

33 (11) She failed to reverse her engines when danger was imminent.

(12) That respondents were negligent in other and further respects, and libelant begs leave to offer proof thereof as and when advised and to amend this libel accordingly.

Seventh: By reason of the aforesaid collision the sand barge sank and was totally lost with a cargo of sand and machinery and the libelant has been damaged as follows:

(a)	Cost of barge	$10,300.00
(b)	Cost of sand on board	125.00
(c)	Cost of one drum of gasoline	13.00
(d)	Cost of repairs to machinery	2,000.00
	Total	$12,438.00

Eighth: That the said barge herein mentioned was a barge made of steel with a concrete bottom of cement, was 68 feet in length, 7 feet in depth, 13½ feet beam and was fully equipped with machinery for use and operation in taking in sand and discharging same from her hole.

Ninth: That the libelant herein was engaged in the business of transporting sand in said barge from different parts of the Republic of Panama to Balboa, Canal Zone, and was selling same to the constructors of buildings in Panama and was earning a profit of $1,000.00 per month, and that he will be deprived of said earnings for a period of at least two months or a total of $2,000.00 to his damage.

Tenth: That as a result of said collision due to the negligence of the respondents herein, Libelant has been damaged in the sum of $14,438.00.

Eleventh: That the original libel herein was filed by libelant on the ninth day of August 1930; that a certain writ of arrest was issued out of this Honorable Court on August 9th, 1930 and on said date, the United States Marshal for the Canal Zone duly seized said respondent Motor Ship "Real" and took said vessel

into his custody in the waters of the Canal Zone and within the jurisdiction of this Court. That on August 13, 1930, Hans Elliott as owner of said Motor Ship "Real" appeared and made claim in and to said vessel, her engines, boats, boilers, tackle, apparel, furniture, etc., and that on said date pursuant to stipulation entered into by and between the proctors for the
34 respective parties hereto, said Hans Elliott executed and filed bond in the sum of $10,000.00 with said Marshal, said bond being conditioned upon the said Hans Elliott abiding by and performing the decree of this Court or upon appeal, whereupon, said Motor Ship "Real" was released from the custody of said Marshal.

Twelfth: All and singular the premises are true and within the Admiralty and the Maritime jurisdiction of this Court.

Wherefore, libelant prays that this Honorable Court may be pleased to decree to libelant the damages aforesaid with interest and cost of suit, and that Hans Elliott may be decreed to pay the same, and that if said sum be not paid, libelant may have recourse to the said bond executed by claimant and the sureties thereon for the release of said Motor Ship "Real" her engines, boats, boilers, tackle, apparel, furniture, etc., from the custody of this Court and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to.

(Signed) CARLOS ICAZA and
L. S. CARRINGTON,
Proctors for Libelant.

United States of America,
Canal Zone. ss.

Thomas R. Lombard, being first duly sworn, deposes and says: That he is the owner of the motor vessel "Lucky Girl" and libelant named in the fore-

going amended libel. That he makes this verification on his own behalf. That he has read the foregoing amended libel, knows the contents thereof and that the same is true of his own knowledge and belief, save and except as to those matters stated on information and belief and as to those matters he believes it to be true. That the sources of his information are from employees working on the "Lucky Girl" and the said sand barge prior to and at the time of the collision.

(Signed) THOS. R. LOMBARD,
Affiant.

Subscribed and sworn to before me this fourth day of October, 1930.

(Signed) J. J. WALKER,
(Seal) Assistant Clerk of the Court.

35

PLACITA.

For October Term, 1930.

Pleas before the Hon. James J. Lenihan, Judge of the District Court for the Canal Zone, at the October Term, 1930, for the Balboa Division, begun on the first Tuesday in October, being the seventh day of October, in the year of our Lord one thousand nine hundred and thirty.

Present: Hon. James J. Lenihan, Judge, presiding; J. J. McGuigan, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal; and J. J. Walker, Second Assistant Clerk of Court.

Attest:

(Signed) J. J. WALKER,
Second Assistant Clerk of Court.

36 ANSWER.

(Filed October 14, 1930.)

Hans Elliot, owner and claimant of the Motorship "Real" her engines, etc., as the same are proceeded against on the libel of Thomas R. Lombard in a cause of collision civil and maritime, answer said libel as follows:

First.

Claimant admits that Thomas Lombard, was the owner and operator of the Motorship "Lucky Girl" and of a certain sand barge, but is unable to aver as to the condition of said barge and therefore demands of libelant strict proof as to its condition prior to the time of alleged collision.

Second.

Claimant admits the allegation contained in Article two of the libel.

Third.

Admits third allegation.

Fourth.

Claimant denies the whole of paragraph number Four of the libel.

Fifth.

Claimant denies the whole of paragraph numbered "Five" of the libel.

Sixth.

Claimant-respondent denies the whole of paragraph numbered "Sixth" of the libel and as well the sub-paragraph there contained.

Seventh.

Claimant has no knowledge or information sufficient to form a belief as to the allegations of the seventh Article of said libel, and therefore deny the same.

Eighth.

Claimant has no knowledge of information sufficient to form a belief as to the allegation of the eighth Article of said libel, and therefore deny the same.

37

Ninth.

Claimant has no knowledge or information sufficient to form a belief as to the allegation of the ninth Article of said libel and therefore deny the same.

Tenth.

Claimant-respondent admits that the cause is within the Admiralty jurisdiction of this Honorable Court as alleged in paragraph numbered "Tenth", but denies that all and singular the premises are true.

Eleventh.

And further answering the claimant-respondent alleges as follows:

That on the morning of July 31, 1930, at or about 2:00 o'clock the Motorvessel "Real" departed from its berth at Dock 16, Balboa, Canal Zone in pursuit of a

voyage to Aguadulce, a port in the Republic of Panama, that after the necessary manuvering it headed out the channel toward the sea and that when so headed it was at or about the middle of the channel upon which heading it proceeded until it arrived abreast of the "oil crib".

When in such position, abreast of "oil crib", a vessel's white, red and green lights was observed to seaward, whereupon the "Real's" course was altered to starboard, and to a point abreast of Buoy 15 and approximately 75 feet off and to the Eastward of Buoy 15; which alteration of course shut out the aforesaid vessels green light, thereupon the "Real's" heading was again altered to one parallel with the channel axis upon which heading she continued, passing buoy 13 approximately 25 feet off and to the Eastward having in sight all of the time only the white and red light of the approaching vessel.

Twelve.

That when the "Real" heading parallel with the axis of the channel arrived at a point approximately 500 yards North of Buoy 9 the aforementioned motor vessel "Lucky Girl" was then Southward of the "Real" and distant about 40 feet and with the lateral distance also about 40 feet, suddenly altered its course to Port closing out its red light to those aboard the
38 "Real" and showing its green light, and to a heading nearly at right angles to the course of the "Real".

Thirteen.

Every effort possible was made by those aboard the "Real" to avoid a collision but because of the limited space in which to manuver due to the sudden alteration to Port of the course of the "Lucky Girl" such efforts were of no avail.

Fourteen.

That all and singular the premises are true.

Wherefore, claimant prays that the libel herein be dismissed with costs.

(Signed) VAN SICLEN & BOGGS,
Proctors for Claimant.

United States of America,
Canal Zone. ss.

Hans Elliott, being duly sworn, says that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Signed) H. ELLIOT,
HANS ELLIOT.

Sworn to before me this 14 day of Oct., 1930.

(Signed) J. J. WALKER,
(Seal) Second Assistant Clerk.

Interrogatories accompanying the answer propounded by claimant to libelant to be answered under oath.

1. What was the length, breadth and depth of hold under deck of such barge as was sunk by alleged collision?

39 2. What was the cubic capacity of such hold?

3. What was the dimensions of the hatch openings?

4. Was such hatch or hatches fitted with coamings?

5. If your answer to the fourth interrogatory is in the affirmative please state the height such coamings extended above the deck.

6. Was such barge fitted with bulkheads?

7. If your answer to the sixth interrogatory is in the affirmative please state how such bulkheads were fitted into the hull, i. e., were they longitudinal and or transvers?

8. Was such bulkheads watertight?

9. What was the license number assigned to such barge by the Canal Zone Government?

10. When was such barge last inspected by Canal Zone Government Inspectors?

11. What repairs if any was recommended at that time?

12. From whom was barge purchased?

13. Where was bill of sale registered?

14. Where was sand alleged to be aboard barge at time of its sinking loaded?

15. What was the depth of water at such loading place (a) at high water (b) at low water?

16. Was the barge fitted with a rudder?

17. If the answer to the sixteenth interrogatory is in the affirmative please state how such rudder was operated.

18. On what date and at what time did such barge depart from its place of loading?

19. How was the navigation lights of the barge situated with reference to the hull?

40 STIPULATION FOR COSTS.

(Filed October 15, 1930.)

Entered into pursuant to the rules and practice of this Court.

Whereas, a cross-libel will be filed in this Court on or about October 15th, 1930, by Hans Elliot against the Motorvessel "Lucky Girl" for the reason and causes in the said cross-libel mentioned; and praying that process may issue against said Motorvessel "Lucky Girl", its engines, tackle, apparel, etc., and the said libelant and the United States Fidelity and Guaranty Co., stipulators, parties hereto, hereby consenting, agreeing, and in case costs are awarded against the said libelant or said stipulators, the decree therefor not exceeding the sum of Two Hundred and Fifty Dollars ($250.00) may be entered against them and each of them, and thereupon execution may issue against their and each of their goods, chattels, lands and tenements or other real estate.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the libelant herein and the stipulator undersigned, The United States Fidelity and Guaranty Co., a corporation doing business in the Canal Zone, shall be and each of them is hereby bound in the sum of Two Hundred and Fifty Dollars ($250.00), conditioned that they shall pay all costs and expenses which shall be

awarded against the said libelant and or the stipulator undersigned or any one of them by decree of this Court, and in case of appeal by any Appellate Court.

(Signed) H. ELLIOT,
UNITED STATES FIDELITY AND GUARANTY COMPANY;
(Signed) W. Y. BOYD,
(Seal) Its Attorney.

Taken and acknowledged this 15th day of October before me.

(Signed) L. J. WALKER,
(Seal) Second Assistant Clerk of Court.

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41 CROSS LIBEL.

(Filed October 15, 1930.)

(Title Omitted.)

To the Honorable, the Judge of the United States District Court in and for the Canal Zone, Balboa Division.

The cross-libel of Hans Elliot as owner of the Motorvessel "Real" against the Motorvessel "Lucky Girl", her engines, tackle, apparel, and furniture, in a cause of collision, civil and maritime, respectfully alleges.

One.

At the times hereinafter mentioned the above named libelant was resident of the Republic of Panama and was the owner of the Motorship "Real" her engines, tackle, apparel, and appurtenances.

Two.

The Motorvessel "Lucky Girl", herein proceeded against, is a vessel of Panaman registry, and is now, or during the currency of process herein will be, within the port of Balboa, Canal Zone, and within the jurisdiction of this Honorable Court.

Three.

On Thursday the 31st of July, 1930, at about 2:50 a. m., a collision occurred between the Motorvessel "Real" and a certain Barge, more fully described in libelants libel, being towed by the Motorvessel "Lucky Girl" in the channel leading to and from the Harbor of Balboa, Canal Zone, by reason of which the "Real" was severely damaged.

42

Four.

The said Motorvessel "Real" was, at the time of said collision, and at all times prior thereto in all respects seaworthy, and properly and efficiently officered, manned, supplied, equipped and furnished, and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition, and suitable for the business and voyage in which she was engaged; that the owners of said Motorvessel had at all times exercised due diligence to make said vessel in all respects seaworthy, and properly and efficiently manned, equipped, supplied and furnished and well and sufficiently fitted and supplied with suitable engines, tackle, apparel, appliances and furniture.

Five.

That at the time of said collision the night was clear and the tide flooding; that said Motorvessel

"Real" was, at said time and for more than twenty minutes prior thereto, proceeding at a moderate rate of speed having careful regard to the existing conditions, was keeping a sharp look-out, was at all of said times on the starboard side of mid channel, and was in all respects complying with the law and the rules of navigation relative to vessels navigating the waters of the High Seas and of the Panama Canal; and that said vessel was at all times navigated with due caution and skill by the officers thereof; that said collision was not caused by any fault, negligence or want of due care on the part of Cross-Libelant, or the Master, or the officers, or crew of said Motorvessel "Real" or any of them; that suddenly and without warning the Motorvessel "Lucky Girl" which was proceeding inbound and to the Westward of mid channel did when about 50 feet distant and to the Southward of the "Real" alter her heading to Port directly across the bows of the "Real"; the Master of the "Real" at once ordered his helm hard a starboard followed almost immediately by an order to go full stern on the engines, which was the only thing that could be done to avoid the collision but because of the close proximity of the vessels one to the other such efforts were of no avail and the "Real" collided with a barge
43 being towed alongside and made fast to, the Motorvessel "Lucky Girl".

Six.

That the Cross-Libelant is informed and believes that the said collision and the consequent damage to said Motorvessel "Real" was entirely due to the fault of the respondent, and of those in charge of the navigation of the said Motor vessel "Lucky Girl", and upon information and belief libelant alleges, that said vessel was at fault in the following, among other particulars:

First: That the vessel did not have a proper, or competent Master, but on the contrary, the Master of said Motor vessel, at the time of said collision, was a wholly incompetent, inexperienced and improper person to be in charge of said vessel.

Second: That said vessel did not have a proper or competent pilot, but on the contrary, the pilot of said Motorvessel at the time of said collision, was wholly incompetent, inexperienced and improper person to act as pilot upon said waters.

Third: That said Motorvessel at, and prior to the time of said collision, did not have a proper watch on deck and in the engine room.

Fourth: That said Motorvessel at, and prior to the time of said collision, did not have a proper and competent look-out on watch.

Fifth: That said Motorvessel at, and prior to the time of said collision, was violating Rule 55 of the Rules and Regulations governing Navigation of the Panama Canal and Adjacent waters and Article XVIII and XXV of the International Collision Rules in that said vessel:—

(a) Failed to navigate so as to pass on the port side of the "Real".

(b) Failed to alter its course to starboard so as to pass on the port side of the "Real".

(c) Failed to keep to that side of the fairway or midchannel which lay on its starboard side.

Sixth: That said Motorship, in violation of Rule 82 of the Rules and Regulations Governing Navi-
44 gation of the Panama Canal and Adjacent waters and of Article XXVIII of the International Collision Rules did alter her course without indicating intention of such alteration by blowing the requisite whistle signal.

Seventh: That the Balboa Channel, where said collision occurred, was and is a narrow channel within the meaning of said Articles relating to narrow channels, and that said Motorship "Lucky Girl" at, and prior to the time of said collision, did fail to keep to that side of mid channel which lay to the starboard of said vessel, in violation of Article XXV of said laws, 26 Stat. at Large 320 as amended.

Eighth: That said Motorvessel was negligent in other and further particulars of which the libelant is not at present advised, and when so advised, will beg leave to offer proof of said negligent acts, and to amend its libel to conform with such facts.

Seven.

That as a result of said collision and damages to the Motorvessel "Real" resulting therefrom, and by reason of the repairs necessitated thereby, cross-libelant has been damaged in the sum of seven hundred fifty dollars ($750.00), no part of which has been paid.

Eight.

That all and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

Wherefore, the cross-libelant prays that process in due form of law and according to the practice of this

Honorable Court, may issue against the said Motorvessel "Lucky Girl", her engines, tackle, apparel and furniture, and that she may be condemned and sold to answer for the damages alleged in this cross-libel; and that this Court will hear the evidence which the libelant will adduce in support of the allegations of th libel and will enter a decree in favor of the libelant for the above mentioned damages and will order the same to be paid and satisfied out of the said
45 proceeds of the Motorvessel "Lucky Girl", together with interest and with the costs of the cross-libelant, and will otherwise right and justice administers in the premises.

(Signed) VAN SICLEN & BOGGS,
Proctors for Cross-Libelant.

United States of America,
Canal Zone, ss.

Hans Elliot, being duly sworn, says that he is the Cross-Libelant above named; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the sources of his information are reports made to him by his employees.

(Signed) H. ELLIOT.
Hans Elliot.

Sworn to before me this 15 day of October, 1930.
(Signed) J. J. WALKER.
(Seal) Second Assistant Clerk of Court.

46 MONITION.

(Issued October 15, 1930.)

The President of the United States of America, to the Marshal of the Canal Zone, Greeting:

Whereas a Cross Libel hath been filed in the District Court of the United States for the Balboa Division of the Canal Zone, on the 15th day of October in the year of our Lord one thousand nine hundred and thirty by Hans Elliot, Cross Libelant, against the Motorvessel "Lucky Girl," her boats, tackle, etc., in a cause civil and maritime (e. g., of collision), for the reasons and causes in the said Cross Libel mentioned, and praying the usual process or monition of the said Court in that behalf to be made, and that all persons interested in the said Motorvessel "Lucky Girl," her engines, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Motorvessel "Lucky Girl," her engines, etc., may for the causes in the said Cross-libel mentioned be condemned and sold to pay the demands of the libelant.

You are hereby commanded to attach the said Motorvessel "Lucky Girl," her engines, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Division of Balboa, on the first day of November, 1930, at 9:00 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction otherwise on the next day of jurisdiction thereafter, and then and there to interpose a claim for the same, and to make their allegations in

that behalf. And what you shall have done in th
premises, do you then and there make return thereo
together with this writ.

Witness, the Honorable James J. Lenihan, Judg
of the said Court, at Ancon, Canal Zone, this 15t
day of October, 1930, in the year of our Lord on
thousand nine hundred and thirty and of ou
47 Independence the one hundred and fifty-fou
(Signed) J. J. WALKER,
(Seal) Second Assistant Clerk.
(Sgd.) VAN SICLEN & BOGGS,
Proctors for Libelant.

MARSHAL'S RETURN.

(Filed November 15, 1930.)

The within Monition came into my hands for ser
vice on the sixteenth day of October, 1930, and o
said date I served the same by offering to read th
same to A. Downer, Captain of the Motorvesse
"Lucky Girl" at Balboa in The Canal Zone, whic
reading was waived, and by delivering to him a tru
copy thereof together with a copy each of the Cros
Libel, and Stipulation for Costs; the said motorvesse
being at the time in Canal Zone Waters at Balboa i
The Canal Zone, I took into my custody the sai
motorvessel "Lucky Girl," her engines, boats, tackl
apparel, furniture, etc., and immediately thereafte
posted the Citation at three places within the Balbo
Division Post Office, Ancon, Court House, Ancon
Post Office, Balboa Heights and published same i
The Panama American, as required by law.

A copy of said Citation is attached, also the proo
of publication, and made part of this Return.

JOHN T. BARRETT,
Marshal of The Canal Zone
By (Signed) CHARLES L. PARKER,
Deputy Marshal.

Fees:	
Service	$6.00
Mileage	.60
Publishing Notice 6	.60
Mileage, publishing	.30
Posting Notices	.60
Mileage, Notices (2 ts)	.90
	$9.00
Publication	$8.15

48 (Title Omitted.)

Violet R. Wunsch, of lawful age, being first duly sworn according to law, deposes and says:

That she is the Advertising Manager of The Panama American Publishing Company, Inc., publishers of The Panama American, a daily newspaper published in the city of Panama, Republic of Panama, and having general circulation within the Canal Zone and the Republic of Panama.

That the Citation, of which the attached is a printed copy, was printed in the morning edition of said newspaper of October 17, 18, and 19, 1930.

(Signed) VIOLET R. WUNSCH.

Subscribed and sworn to before me this 22nd day of October, A. D. 1930, at Ancon, Canal Zone.

(Signed) JAMES J. WALKER,
(Seal) Notary Public.
My commission expires November 22, 1931.

49 CITATION.

(Title Omitted.)

Hans Elliott, Cross-Libelant,
vs. No. 1028, In Admiralty.
The Motorvessel "Lucky Girl," her engines, tackle, etc., Respondent.

Whereas, a Libel in rem, hath been filed in the District Court of Canal Zone, Balboa Division, on the 15th day of Oct., 1930, by Hans Elliot, Cross-Libelant, vs. The Motorvessel "Lucky Girl,' for the reasons and causes in the said libel mentioned and praying the usual process and citation of the said Court in that behalf to be made, and that all persons interested in the said Motorvessel "Lucky Girl," her engines, tackle, eac., may be cited in general and special to answer the premises and all proceedi gs being had that the said Motorvessel "Lucky Girl" her engines, tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libelants.

Now therefore, pursuant to the Monition Attachment and issued under seal of the said Court to me directed and delivered I do hereby give public notice to all persons claiming the said Motorvessel "Lucky Girl," her engines, tackle, etc., or knowing or having anything to say why the said Motorvessel "Lucky Girl," her engines, tackle, etc., should not be condemned and sold pursuant to the prayer of the said Cross-Libelant that they are admonished to appear before the said Court to be held in and for The Balboa Division on the 1st day of November, 1930, at 9 o'clock in the forenoon of the same day, if the same
50 shall be a day of jurisdiction, thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf, and that

they be and appear before the said District Court on the 1st day of November, 1930, at 9 o'clock in the forenoon at the Court Room, Balboa Division, then and there to answer the said Libel and make their allegations in that behalf.

JOHN T. BARRETT,
Marshal of The Canal Zone,
By (Signed). CHARLES L. PARKER,
Deputy Marshal.
(Signed) VAN SICLEN & BOGGS,
Proctors for Cross-Libelant.

Dated at Ancon, Canal Zone, this 16th day of October, 1930.

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51 STIPULATION.

(Filed October 18, 1930.)

It is hereby stipulated by and between the protors for the respective parties to this action that the motor vessel "Lucky Girl", now in the hands of the Marshal for the Canal Zone, may be released in giving the regular bond in the sum of $750.00 and upon filing said bond, it is further agreed that the said Marshal release said motor vessel "Lucky Girl".

VAN SICLEN & BOGGS,
By (Signed) J. J. CASTO;
Proctor for Cross Libelant.
(Signed) L. S. CARRINGTON,
Proctor for Cross-Respondent.

To Clerk of Court for Record.

JOHN T. BARRETT,
Marshal of The Canal Zone.
By (Signed) CHARLES L. PARKER,
Deputy Marshal, 10/18/30.

52 RELEASE BOND.

(Filed October 18, 1930.)

(Title Omitted.)

Know all men by these presents, that we, Thomas Lombard, as principal and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the Marshal for the Canal Zone in the sum of Seven hundred and fifty dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators and successors jointly and severally firmly by these presents.

Dated at Ancon, Canal Zone this 18th day of October 1930.

The condition of this obligation is such that whereas, on the 15th day of October 1930, Hans Elliot filed a cross-libel in the District Court for the Canal Zone against the motor vessel Lucky Girl, claiming damages in the sum of seven hundred and fifty dollars for collision with the Real, a motor vessel, and whereas, by stipulation between the proctors for the respective parties it has been agreed that said Lucky Girl may be released on the filing of a bond in the sum of seven hundred and fifty dollars, now, the condition of this obligation is such, that if the above bounden Thomas Lombard shall well and truly pay unto the Marshal of the Canal Zone for the benefit of the cross-libelant herein, such sums as may be awarded to him in a judgment of this Court, or in the appellate Court, if said cause be appealed and shall well and truly obey

all orders and decrees of this Court, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) THOS. R. LOMBARD,
Principal.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By (Signed) W. Y. BOYD,
(Seal) Its Attorney.

53 United States of America,
Canal Zone, ss.

Before me, personally appeared Thomas Lombard and W. Y. Boyd, as Attorney for the United States Fidelity and Guaranty Company, and each for himself and the interests he represents acknowledged that he signed the within bond for the purposes therein contained, and each declared and sworn that he it is worth the sum of seven hundred and fifty dollars, over and above his legal liabilities and exemptions.

Sworn to before me this 17th day of October, 1930.

(Signed) J. J. WALKER,
(Seal) Asst. Clerk of the Court.

To Clerk of Court, Ancon, C. Z.

JOHN T. BARRETT,
Marshal of Canal Zone.

By (Signed) CHARLES L. PARKER,
Deputy Marshal, 10/18/30.

"Luck Girl" released from custody 8:20 A. M. 10/18/30.

54 EXCEPTIONS TO CROSS-LIBEL.

(Filed October 31, 1930.)

To the Honorable James J. Lenihan, United States District Judge for the Canal Zone.

The exception of Thomas R. Lombard, owner of the Motorvessel "Lucky Girl," to the cross-libel and complaint of Hans Elliott, alleges:

1. That paragraph numbered "Seven" of the cross-libel states that the cross-libelant "has been damaged in the sum of $750.00" by reason of repairs to the motor vessel "Real" as a result of the collision mentioned in said cross-libel, but fails to specify the nature of the damages or the particular part of said boat that was damaged, and the respondent is unble to intelligently answer said paragraph, and therefore demands a bill of particulars.

2. That the cross-libelant fails to state in his verification the source or sources of his information as to the matters alleged and stated in said cross-libel "on information and belief".

Wherefore respondent prays that the cross-libel may be dismissed with costs.

(Signed) L. S. CARRINGTON,
Proctor for Respondent.

55 MINUTES OF (November 1, 1930.)

This cause coming on this day on respondent's exceptions to cross-libel, filed herein October 31, 1930, William A. Van Sielen of Van Sielen & Boggs for

cross-libelant and L. S. Carrington for respondent, the exceptions are agreed to by counsel in open Court, and the cross-libelant is given thirty days in which to amend, and the respondent thirty days thereafter in which to answer or plead.

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56 BILL OF PARTICULARS.

(Filed November 24, 1930.)

The Cross-Libelant hereby furnishes the bill of particulars of the matters called for by the demand of the respondent made in this action November 1, 1930.

The injury occasioned to the Motorvessel "Lucky Girl" by reason of the collision is as follows, to-wit:

1. On the vessels Starboard side the first and second frames, counting from stem, is badly bent. Shearstrake plate and plate below is badly bent; such bends occur from stem to abaft number two frame.

2. On the vessels Port side from stem to number one frame the Shearstrake plate is bent.

3. The plates aforesaid must be rolled and faired.

4. The frames must be faired.

5. It is estimated that the time necessary to make repairs will take six days, requiring that vessel be out of commission for six days.

Very truly yours,
(Signed) VAN SICLEN & BOGGS,
Proctors for Libelant.

To:

CARLOS ICAZA and L. S. CARRINGTON,
Proctors for respondent.

Dated: November 24, 1930.

Service copy admitted 24th day of November, 1930.
(Signed) CARLOS ICAZA & L. S. CARRINGTON,
Proctors for Respondent.

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57 ANSWER OF RESPONDENT TO CROSS-LIBEL.

(Filed December 20, 1930.)

To the Honorable James J. Lenihan, United States District Judge for the Canal Zone.

The Answer to Thomas R. Lombard, owner of the motorvessel, "Lucky Girl" respondent in the above cause, to the cross-libel of Hans Elliott, in a cause of collision, civil and maritime, admits, denies and alleges as follows:

First: He admits paragraph "One" of the cross-libel.

Second: He admits paragraph "Two" of the cross-libel.

Third: He admits that a collision occurred between the motor vessel, "Real" and a certain barge being towed by the motorvessel "Lucky Girl", on the early morning of July 31st 1930, in the harbour of Balbo, Canal Zone, but denies that the "Real" was severely damaged, or damaged at all, as set out in paragraph "Three" of the cross-libel.

Fourth: He denies each and every, all the allegations in paragraph "Four" of the cross-libel.

Fifth: He admits that at time of the collision the night was clear and tide flooding; but denies all the other allegations and arguments as set forth in paragraph "Five" of said cross-libel.

Sixth: He denies all the allegations of paragraph "Six" and the sub-paragraphs numbered "First" to "Eight" inclusive, of said paragraph "Six".

Seventh: He denies that the "Real" was in any way damaged as set forth in paragraph "Seven" of the cross-libel or as set out in the amended bill of particulars.

Eighth: He denies that all and singular the premises are true, but admits the Admiralty jurisdiction of this Court.

58 Ninth: All and singular the premises are true.

Wherefore, respondent prays that the cross-libel herein be dismissed with costs.

(Signed) THOS. R. LOMBARD,
Respondent in cross-libel.

United States of America,
Canal Zone, ss.

Thomas R. Lombard, after being duly sworn, on oath says: That he is the Owner of the motor vessel Lucky Girl and respondent in the above cause; that the foregoing answers to the cross-libel, subscribed to by him are true of his own knowledge, information and belief: That the sources of his information are derived from employees in his service at the time of the collision.

(Signed) THOS. R. LOMBARD.

Subscribed and sworn to before me this 20th day of December, 1930.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of the Court.

Interrogatories Accompaning Answer to Cross-Libel to be Answered under Oath by Cross-Libelant.

1. At what time did the motorvessel "Real" leave the harbor of Balboa on the early morning of July 31st 1930, and for what port was she bound?

2. At the time the "Real" left Balboa on July 31st 1930, was she licensed to operate in Canal Zone waters?

3. If your answer to interrogatory "2" be in the affirmative, please state when and by whom said License was issued and the number of said license?

4. Did the "real" proceed on her voyage immediately after the collision, and if so to what port?

5. What cargo did she have on board at time of collision and for what place?

59 6. When did the "Real" return to Balboa Harbor after the collision on July 31st and what was her cargo, if any?

7. What was the name of the pilot actually at the wheel at the time of the collision with the Lucky Girl and the sand barge?

8. Did said person have a license to operate boats in Canal Zone waters.

9. If your answer to the Interrogatory No. 8 be in the affirmative please state when and by whom said license was issued and the number thereof.

60 ANSWERS OF LIBELANT TO THE INTERROGATORIES PROPOUNDED TO HIM IN THIS CAUSE.

(Filed December 20, 1930.)

To the First Interrogatory he says: 52 ft. Long 17 ft. wide 6-½ ft. deep.

To the Second Interrogatory he says: Approximately 5250 Cubic ft.

To the Third Interrogatory he says: 52 ft. long 13 ft. 6 ins. wide.

To the Fourth Interrogatory he says: Yes.

To the Fifth Interrogatory he says: 2 ft. 2 ins.

To the Sixth Interrogatory he says: Yes.

To the Seventh Interrogatory he says: Transverse.

To the Eighth Interrogatory he says: Bulk heads were pump tight.

To the Ninth Interrogatory he says: 4584.

To the Tenth Interrogatory he says: June 9th 1930.

To the Eleventh Interrogatory he says: None.

To the Twelfth Interrogatory he says: Mr. Salazar of Panama City.

To the Thirteenth Interrogatory he says: Was a Private Sale. Not registered.

To the Fourteenth Interrogatory he says: In hopper amidships in hold.

To the Fifteenth Interrogatory he says: (a) 17 ft. (b) Nothing.

To the Sixteenth Interrogatory he says: Yes.

To the Seventeenth Interrogatory he says: By tiller.

To the Eighteenth Interrogatory he says: About 5 P. M. July 30, 1930.

To the Nineteenth Interrogatory he says: Forward, on bow 3 feet above deck. Aft, 6 ft. above.

(Signed) THOS. R. LOMBARD.

United States of America,
Canal Zone, ss.

Thomas R. Lombard, libelant in the above cause, after being duly sworn, on oath says, that the foregoing answers to interrogatories subscribed by him are true of his own, knowledge, information and belief.

(Signed) THOS R. LOMBARD.

Sworn to before me this 20th day of December, 1930.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of the Court.

61 ANSWER OF CROSS LIBELANT TO INTERROGATORIES OF CROSS RESPONDENT.

(Filed January 6, 1931.)

To the Honorable James J. Lenihan, United States District Judge for the Canal Zone.

Comes now the Cross Libelant, Hans Elliott, and herewith answers the interrogatories prounded by the Cross Respondent:

To the First Interrogatory he says:
That the Motorvessel "Real" left the harbor (dock) of Balboa on July 31st, 1930 at or about the hour of two o'clock Ante Meridian, bound for the Port of Adquadulce, Republic of Panama.

To the Second Interrogatory he says:
That at the time the Motorvessel "Real" left Balboa on July 31st 1930, she was licensed to operate in Canal Zone waters.

To the Third Interrogatory he says:
That the license was issued on or about the 23rd day of July, 1929, by the Canal Zone Government (Auditor), the number of such license being 2450.

To the Fourth Interrogatory he says:
That following the collision the Mortorvessel "Real" assisted in towing the "sand barge" into shallow water and thereafter "stood by" together with the Motorvessel "Lucky Girl" offering such assistance as may be needed, and not until she was assured that no further assistance was needed did she proceed. When she did proceed she proceeded to the Port of Aquadulce.

To the Fifth Interrogatory he says:
A general cargo.

To the Sixth Interrogatory he says:
The "Real" returned to Balboa on or about the 2nd day of August, 1930.

To the Seventh Interrogatory he says:
There was no pilot "actually at the wheel at the time of the collision with the sand barge".

62 To the Eighth Interrogatory he says:

The person at the wheel did not have a license.

To the Ninth Interrogatory he says:

Answer to interrogatory numbered "eight" not in the affirmative.

(Signed) H. ELLIOT,
Cross Libelant.

Hans Elliott, the foregoing Cross Libelant, being sworn says, That the foregoing answers to interrogatories subscribed by him are true to the best of his knowledge, information and belief.

(Signed) H. ELLIOT,
HANS ELLIOTT.

Sworn to before me this 6th day of January, 1931.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of the Court.

63 PLACITA.

For Term Month of April, 1931.

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone, at the April Term, 1931, for the Balboa Division, begun on the first Tuesday in April, being the seventh day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. John T. Barrett, Marshal; Jack Hayes, Assistant District Attorney; Charles L. Parker, Deputy Marshal, and F. H. Sheibley, Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

64 Minutes of April 25, 1931.

Comes L. S. Carrington, proctor for libelant, this 25th day of April, 1931; and moves the Court to set this cause for trial.

And comes Wm. A. Van Siclen, of proctors for respondent, cross-libelant, and moves to have the hearing on the cross-libel consolidated with the hearing on the libel.

And the Court being fully advised in the premises, allows the said motions.

It is therefore ordered this 25th day of April, 1931, that this cause be and the same is hereby set tenatively for trial on May 8, 1931, with the understanding that both counsel will advise definitely prior thereto as to whether they will be ready to go to trial.

65 PLACITA.

For Term Month of July, 1931.

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone, at the July Term, 1931, for the Balboa Division, begun on the first Tuesday in July, being the seventh day of July, in the year of our Lord one thousand nine hundred and thirty-one.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; Jack Hayes, Assistant District Attorney; Charles L. Parker, Deputy Marshal, and F. H. Sheibley, Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

66 Minutes of July 24, 1931.

This cause coming on regularly this day for trial, with the parties hereto present in person and by proctors, Carlos Icaza A. and L. S. Carrington for libelant and cross-respondent and Wm. A. Van Siclen for respondent and cross-libelant, both sides announce ready.

And now comes libelant and states that the evidence taken before the Board of Commissioners, and the findings of said Board, had already been made and that he was ready to submit same to the Court, and proceed with the proof of damages. Respondent and cross-libelant by proctor objects thereto and declines to stipulate; and announces in open Court that he desires to proceed merely with the introduction of evidence on the question of liability and that he does not desire to proceed at this time with any evidence on the question of damages. The Court rules that all of the evidence, both on liability and damages, shall be taken at this time to which ruling the respondent and cross-libelant excepts.

Thereafter trial is had, Thomas R. Lombard and Feneuel Smith testifying under oath for libelant; and the hour being now 12 noon recess is declared to 2 p. m. this day.

The Court reconvenes pursuant to recess taken, and witness Feneuel Smith takes the stand on cross-examination. At the afternoon session also come witnesses Marcel Martin, Lt. A. L. Byrholdt, and T. O'Shea for the libelant and testify in the order given under oath. Thomas R. Lombard is recalled on direct examination.

And the hour being now 4:45 p. m. this cause is continued for further hearing to 11 o'clock a. m. of the 25th day of July, 1931, and the Court is declared at recess until 10 a. m. of said day.

67 Minutes of July 25, 1931.

This cause coming on at 11 o'clock a. m. this day for further hearing, and the parties hereto present in person and by proctors, Carlos Icaza A. and L. S. Carrington for libelant and cross-respondent and Wm. A. Van Siclen for respondent and cross-libelant, comes now H. Wheeler Roe and testifies under oath for the libelant.

At this stage of the proceedings proctor for respondent orally moves to amend paragraph numbered "First" of the answer to the answer to the libel as follows, "that Thomas Lombard is not the sole owner", to which motion the libelant objects, and the motion is denied.

Thereafter libelant Thomas R. Lombard is recalled to the stand on re-direct examination.

And the hour being now 12:06 p. m., recess is declared to 1:30 p. m. this day.

At the afternoon session the parties and proctors are present as before, and the following named witnesses testify in the order given under oath for libelant, to wit, Thomas R. Lombard, R. K. Morris, D. F. Reeder, H. Wheeler, Roe, Alberto Obarrio, and Thomas R. Lombard recalled. Respondent moves that the testimony of H. Wheeler Roe be stricken. Ruling on the motion is reserved.

And the libelant resting, respondent moves that the libel be dismissed on two grounds, to wit, 1—That no

damages have been proven; and—2—That the boat being navigated was in charge of an incompetent person. The Court overrules the motion on the second ground thereof and reserves its ruling on the first ground. And the respondent excepts to the ruling of the Court on the second ground of said motion.

And the hour being now 3:55 p. m. this cause is continued for further hearing to the 3rd day of August, 1931, at 10:00 a. m.; and the Court adjourns to July 30, 1931, at 10:00 a. m.

68 Minutes of August 3, 1931.

This cause having been on July 25, 1931, continued for further hearing to this 3rd day of August, 1931, Messrs. Icaza and Carrington appearing for the libelant-cross respondent and Wm. A. Van Siclen of Van Siclen & Boggs appearing for respondents-cross libelant, comes now Ignacio Molino, Jr., and C. M. Lupfer and testify under oath for the respondents-cross libelant, and the respondents-cross libelant thereupon move that the libel be dismissed. The Court, having heard the arguments of proctors on said motion, overrules same. And an exception to the ruling of the Court is entered for respondents-cross libelant. Hans Elliott, Arvid Ekstrand, and Narciso Navis testify under oath for the respondents-cross libelant, the last witness through duly sworn English Spanish interpreter, F. H. Sheibley.

And the hour being now five o'clock p. m., Court recesses until nine thirty o'clock a. m., August 4, 1931, and the cause is continued for further hearing to said day and hour.

69 PLACITA.

(For Term Month of August, 1931.)

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal

Zone, at the August Term, 1931, for the Balboa Division, begun on the first Tuesday in August, being the 4th day of August, in the year of our Lord one thousand nine hundred and thirty-one.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; Jack Hayes, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal, and F. H. Sheibley, Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

70 Minutes of August 4, 1931.

This cause coming on for further hearing at nine thirty o'clock a. m. this 4th day of August, 1931, Messrs. Icaza and Carrington for libelant-cross respondent and Wm. A. Van Siclen for respondents-cross libelant, by stipulation in open Court of proctors for the parties hereto, the deposition of one C. F. Magee, marked as respondent's exhibit F., is offered and admitted in evidence. Thomas Inverdale, Allan Stewart Wallace, Joseph Martin, Hans Elliott, and James Bradley testify under oath for respondents-cross libelant, and respondents-cross libelant rest. C. M. Lupfer, A. J. Byrholdt, Robert Pitt Morgan, Marcel Martin, and Feneuel Smith testify under oath in rebuttal for the libelant-cross respondent, and the libelant-cross respondent rests. Estaban Peralta testifies under oath in surrebuttal through duly sworn English Spanish interpreter, F. H. Sheibley, and respondents-cross libelant rest.

And both sides having rested, respondents-cross libelant renew motion to dismiss the libel and for damages

costs; and the motion is again overruled. And an exception to the ruling of the Court is entered for respondents-cross libelant.

The Court thereupon takes the cause under advisement, with leave to proctors to file simultaneous briefs herein within six weeks from this date.

71 PLACITA.

For Term Month of September, 1931.

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone, at the September Term, 1931, for the Balboa Division, begun on the first Tuesday in September, being the 1st day of September, in the year of our Lord one thousand nine hundred and thirty-one.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; Jack Hayes, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal, and F. H. Sheibley, Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

72 Minutes of September 5, 1931.

The Court having heretofore, to wit, on August 4, 1931, given leave to proctors to file simultaneous briefs herein within six weeks,

Now, on this 5th day of September, 1931, come the parties by their proctors and orally move the Court for an extension of time in which to file said briefs,

And the Court being fully advised in the premises, It is ordered that said oral motion be and the same is hereby granted; that the time for proctors to file simultaneous briefs herein be and the same is hereby extended to the 2nd day of January, 1932.

73 PLACITA.

(For Term Month of October, 1931.)

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone at the October Term, 1931, for the Balboa Division, begun on the first Tuesday in October, being the 6th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; Jack Hayes, Assistant District Attorney; Hon. John T. Barrett, Marshall; Charles L. Parker, Deputy Marshal, and J. J. Walker, Deputy Clerk of Court.

Attest:

(Signed) J. J. WALKER,
Deputy Clerk of Court.

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74 STIPULATION FOR REMOVAL OF CERTAIN EXHIBITS.

(Filed October 23, 1931.)

It is hereby stipulated and agreed by and between the proctors for the respective parties herein that the following exhibits, now in the registry of the Court

and introduced by the Libelant may be withdrawn by depositing in lieu thereof photo-stats of the records offered and admitted, to wit page 1 of Exhibt. No. 3.

It is further agreed that Exhibit No. 8 not having been admitted in evidence the same may be withdrawn in its entirety.

(Signed) L. S. CARRINGTON,
Proctors for Libelant.
(Signed) VAN SICLEN & BOGGS,
Proctors for Respondent.

Stipulation approved, and exhibits may be withdrawn accordingly.

(Signed) JAMES J. LENIHAN,
Judge.

Oct. 23, 1931.

75 STIPULATION IN RE. BRIEFS.

(Filed December 22, 1931.)

It is stipulated and agreed by and between the Proctors for the respective parties herein that the time for filing briefs in the above captioned and entitled matter be extended to and including the 14th day of January, 1932.

Dated: December 21, 1931.
(Signed) CARLOS ICAZA and L. S. CARRINGTON,
Proctors for Libelant and Cross-Respondent.
VAN SICLEN & BOGGS, by
(Signed) WM. A. VAN SICLEN,
Proctor for Respondent and Cross-Libelant.

76. PLACITA.

(For Term Month of August, 1932.)

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone, at the August Term, 1932, for the Balboa Division, begun on the first Tuesday in August, being the 2d of August, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; H. A. B. Schwartz, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal; F. H. Sheibley, Clerk of Court, and J. J. Walker, Deputy Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

77. Minutes of August 13, 1932.

The Court this 13th day of August, 1932, announces and signs its Findings of Fact Conclusions of Law and Opinion herein, and directs that same be filed as of this date.

And the respondents cross-libelant note their exception to the findings of the Court.

The Court thereupon allows the libelant one week in which to submit a decree conformable with the conclusions of law herein reached.

78 United States District Court in and for the Canal Zone Balboa Division.

Thomas R. Lombard, Libelant,

v.

The Motor Ship Real, her engines, boats, boilers, tackle, apparel, furniture, Etc., Etc. and Hans Elliott owner of said motor ship Real, Respondents,

Hans Elliott, Cross-libelant,

v.

The Motor vessel Lucky Girl, her engines, boats, tackle, apparel, furniture, etc. Respondent.

No. 1028, In Admiralty.

FINDINGS OF FACT—CONCLUSIONS OF LAW AND OPINION.

(Filed August 13, 1932.)

This case having come on for trial on July 24, 1931, which trial was concluded on August 4, 1931, on the issues joined by the Amended Libel filed herein on October 4, 1930, and by the Answer filed hereon October 14, 1930, and by the Cross-libel filed herein on October 15, 1930, and by the Answer to the Cross-libel filed hereon on December 20, 1930, and

The parties hereto being personally present and by their proctors Carlos Icaza A. and L. S. Carrington for libelant and cross-respondent and Wm. A. Van Siclen for respondent and cross-libelant and

The Court having, on August 4, 1931, at the close of the trial, taken the case under advisement and given the proctors for the parties leave and time to file briefs herein, and

Proctors for the Libelant and Cross-respondent having filed herein their Brief on January 14, 1932, and Proctor for Respondents and Cross-libelant having filed herein his Brief on January 14, 1932, and

The Court being now fully advised in the premises makes and files herein this 13th day of August, 1932, its Findings of Fact, Conclusions of Law, and Opinion, as follows:

(CB-4523-1) (75).

79 FINDINGS OF FACT.

On the Pacific Side of the Isthmus, the channel of the Panama Canal begins at a point some distance seaward from Balboa, Canal Zone, in Panama Bay. The channel is in a northeasterly and southwesterly direction. It is 500 feet wide and 32 feet deep at low water.

II.

The sides of the channel are designated as prism lines; the one side being designated as the east prism line and the other being designated as the west prism line.

Along these prism lines at appropriate distances there are buoys marking the channel. At the places here involved, the buoys are anchored one opposite another, that is, a buoy in anchored on the west prism and directly opposite is a buoy anchored on the east prism and so on along the channel. The buoys are numbered, number one buoy being anchored at the beginning of the channel on the west prism; number two buoy being anchored at the beginning of the channel on the east

prism; number three buoy being anchored some 1100 yards distant from number one buoy on the west prism; number four buoy being anchored opposite number three buoy and some 1100 yards distant from number two buoy on the east prism; and so on along the prisms of the channel.

Some of the buoys are lighted; others are not lighted. Some have white lights and some red lights; the white lights being placed on the odd numbered buoys and the red lights being placed on the even numbered buoys.

III.

The channel is dredged and immediately outside of the channel is shoal water which is comparatively deep where the channel begins but becomes shallow towards Balboa.

IV.

The "Lucky Girl" is a vessel 45 feet long, 11 feet wide, and draws about 6 feet of water. She was built for heavy duty service in fishing and is similar to a small tug having a 35 to 40 horse power diesel engine and a wooden hull. At the time here in question, she was equipped for towing purposes, with a towing deck a little aft of amidships.

V.

Barge "No. 4584" was a steel barge, 85 feet long, 17 feet wide, and of a draft of about 7 feet. The barge was pointed a shipshape barge. The bottom was wood over which was a layer of cement, so that her bottom was composed of wood and concrete.

80 Inside the barge was a wooden hopper. Forward and aft there was a centrifugal sand pump attached to a 75 horse-power gasoline engine.

VI.

At the time here in question, the "Lucky Girl" was engaged in towing Barge "No. 4584" from Chame Bar into Balboa; the barge being loaded with cargo consisting of about 85 cubic yards of sand.

These vessels had been so engaged in the business of bringing sand from Chame Bar to Balboa for a period of about three months prior to July 31, 1930.

VII.

At the times here in question the officers and crew of the "Lucky Girl" and Barge "No. 4584" consisted of nine men.

VIII.

Also, at the time here in question, Barge "No. 4584", so loaded, was made fast to the starboard side of the "Lucky Girl". About 50 feet of the Barge extended ahead of the bow of the "Lucky Girl" and the stern of the "Lucky Girl" extended behind the stern of the barge about 10 to 15 feet.

IX.

About 2:30 on the morning of July 31, 1930 the "Lucky Girl" with her loaded tow on her starboard side approached the west prism of the channel and crossed it, entering the channel at a point just south and seaward of Buoy No. 5. It proceeded into the channel to a point between the west prism and the

center of the channel when the Tug Chagres hereinafter referred to was sighted coming down the channel from Balboa to the sea.

X.

Near Buoy No. 8, at the east prism, the Panama Canal Dredge Las Cruces was moored, where it was engaged in dredging in the channel. This Dredge is 50 feet wide and the digging spot was about 75 feet inside the channel from the east prism line; so that this dredge, when not operating occupied about 125 to 135 feet of the east side of the channel.

XI.

The Panama Canal Tug "Chagres" is about 26 feet wide. On the morning in question, she left Balboa for the sea towing a loaded scow fastened to her starboard side. The scow is about 60 feet wide. Thus, the "Chagres" and the scow alongside were about 86 feet wide.

81

XII.

As the Chagres was proceeding to sea and was pursuing a course in the channel about 60 or 70 feet from the west prism thereof, she sighted the Lucky Girl and her tow about one mile away proceeding towards Balboa. At this time, the Captain of the Chagres could see the red, green, and white lights on the Lucky Girl as well as two lights on the tow. At the time the Lucky Girl was first sighted by the Chagres, she was somewhere near the center of the channel, although on the westerly side of the center. Also, at this time, the Lucky Girl was about one-half mile to the sea side of the Dredge Las Cruces and the Chagres was some distance to the Balboa side of said dredge.

XIII.

After the Chagres sighted the Lucky Girl, the Chagres kept its course in the channel about 60 or 70 feet from the west prism thereof and the Lucky Girl kept its course in the channel near the westerly side of the center of the channel.

When they had thus proceeded for four or five minutes, the Captain of the Chagres noted that the Lucky Girl took a sheer to its port side or towards the west prism of the channel. At that time, it appeared to both the Captain of the Lucky Girl and the Captain of the Chagres that their respective vessels with tows would pass about opposite to the place where the Dredge Las Cruces was stationed.

Seeing the movement of the Lucky Girl, namely, the turn or sheer thereof to its port side, the Captain of the Chagres gave two blasts of his whistle, thus indicating a signal that the Chagres would pass the Lucky Girl starboard to starboard.

The whistle on the Lucky Girl was either out of commission or was so operated and adjusted, at the time, that it was not in condition to be quickly used. In any event, the Lucky Girl did not respond with its whistle but did continue its maneuver towards the west prism of the channel so as to pass the Chagres starboard to starboard.

The speed of the Lucky Girl with her tow was about 1-½ miles per hour and that of the Chagres with her tow was about four miles per hour.

XIV.

Rule 55 of the Panama Canal Rules and Regulations governing navigation in the Panama Canal provides:

"In the Canal, vessels meeting shall pass to the port side of each other, unless there be some special reason to the contrary and passing to starboard is authorized by the Canal pilots."

Rule 18 of the International Rules provides:

"When two steam vessels are meeting end on or nearly end on so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

Rule 59 of the Panama Canal Rules and Regulations provides:

"Vessels passing Canal equipment at work: Panama Canal floating equipment at work in a stationary position in the Canal prism shall have prior right to such position; and it shall be unlawful for a passing vessel to foul such equipment, or its moorings, in any way whatever.

XV.

The Chagres and the Lucky Girl with their respective tows on their respective starboard sides did pass each other starboard to starboard just opposite where the dredge Las Cruces was stationed.

At the time of this passing, the Chagres was in the channel about 60 or 70 feet from the west prism and proceeding to sea and the Lucky Girl was outside the channel about 50 or 60 feet from the west prism and proceeding towards Balboa. There was, then, a distance of some 110 to 130 feet between the tows of the respective vessels as they passed.

Between the Chagres and the Dredge Las Cruces there was a distance of more than 300 clear feet when the Dredge was not swinging, as it was not when the vessels passed, and the vessels with their tows could have safely passed each other port to port and opposite the Las Cruces in such distance of 300 feet.

Taking into consideration the location of the Dredge Las Cruces; the time of night and the consequent impaired visibility at such time so far as gauging distances is concerned; the fact that both vessels had tows; the respective positions of the vessels when first sighted; and the fact that, as they approached each other, it appeared, as it subsequently happened, that they would pass each other opposite the Dredge Las Cruces, it was proper and safe navigation that they should pass starboard to starboard, as they did, rather than port to port.

XVI.

The Motor Vessel Real is a vessel 64 feet long, 17 feet beam, with a draft of about 6 feet. Her engine room and pilot house are located about 10 feet from the stern, her cargo space being forward of
83 the engine room. She has a capacity of 55 tons. At full speed she makes from 5 to 5-½ miles per hour. At the time in question, her officers and crew consisted of seven men. She was, and had been for some time, engaged in carrying general cargo between Balboa, Canal Zone, and Aguadulce, Republic of Panama.

XVII.

About 2:30 in the morning of July 31, 1930, the Motor Vessel Real left the port of Balboa bound for Aguadulce carrying a general cargo of from 42 to 45 tons.

About 2:40, she entered the channel of the Canal proceeding to sea. About 2:50 she was about in the center of the channel off the Oil Crib, which is at the east prism of the Canal just opposite Buoy 17, which is on the west prism. Just prior to the collision hereinafter described, she was traveling to sea in the channel about 35 or 40 feet from the west prism.

XVIII.

After the Lucky Girl had passed the Chagres and while she was still some 50 or 60 feet outside the Canal and west prism thereof, the Master of the Lucky Girl saw lights of a vessel which was proceeding in the channel from Balboa towards the sea. The lights which he sighted were one white light and a green light; at that time no red light on the oncoming vessel was visible to him.

Seeing the oncoming vessel, the Lucky Girl continued its course outside the channel and about 50 or 60 feet outside the west prism. The oncoming vessel was the Real above described. Some seven minutes elapsed from the time the Lucky Girl sighted the Real until the collision hereinafter referred to.

XIX.

Up to the time that the bows of the Barge 4584 and the Real were about 50 feet apart head-on, the Real was pursuing a course in the channel close to the west prism and the Lucky Girl was pursuing a course outside the channel about 50 or 60 feet outside the west prism; the Lucky Girl proceeding towards Balboa and the Real proceeding towards the sea.

When the vessels were thus about 50 feet apart, the Real turned towards the west prism and thus toward the Lucky Girl.

Seeing this maneuver of the Real, the Captain of the Lucky Girl stopped his engine and went full speed astern. But this operation was of no avail at such a close distance. The result was that the bow of the Real rammed the Barge and broke a large hole in it. The crew of the Real threw a line to the Barge but it could not be fastened and the real pushed the Barge farther away from the channel in an effort to get it to shallow water.

84 The collision occurred just off Buoy 11 and the Barge sank about 150 feet outside the west prism of the channel where it now lies.

XX.

Neither vessel gave any signals of any kind prior to the collision. The distance from the place at which the Lucky Girl sighted the Real, to the place of collision was from 800 to 1100 yards.

At the times here in question, the tide was about 2-3 flood. The water at the place of collision is more shallow than at the place where the Lucky Girl passed the Chagres. At all places outside the channel where the Lucky Girl was being navigated, the water was deep enough at 2 3 flood-tide for such vessel and Barge to safely navigate. At a point about 500 feet beyond the point of collision, the water becomes so shallow that vessels of the draft of the Lucky Girl and the Barge could not be safely navigated therein and they would ground therein.

When the Lucky Girl had passed the Chagres and had then sighted the Real, it would have been unsafe navigation for the Lucky Girl with its large tow to attempt to get back into the channel and over a sufficient distance therein to pass the Real port to port, because of the lack of time for such maneuver.

In the conditions existing, it was only safe and cautious navigation for the Lucky Girl to continue on her course outside the channel until it had passed the Real starboard to starboard and then, after passing to reenter the channel.

At about the time of the collision, the Real was maintaining its speed of about 5 miles per hour and the Lucky Girl was maintaining its speed of about 1-½ miles per hour.

XXI.

At the times here involved, the Real was owned by Hans Elliott and the Lucky Girl and Barge were owned by libelant, Thomas R. Lombard. At such times, neither Mr. Elliott nor Mr. Lombard were aboard and both vessels were being operated by their employees. The Answer of Respondent filed herein admits the ownership of the Lucky Girl and Barge to be in Thomas R. Lombard.

XXII.

On December 12, 1929, a corporation designated as "Panama Sand Company, Inc." was duly incorporated at Panama City, Republic of Panama, under the laws of the Republic of Panama; the incorporators being Dr. Dennis Frank Reeder and Thomas Russell Lombard.

85. The Articles provided that the Board of Directors should be Dennis Frank Reeder, Thomas Russell Lombard, and Alberto de Obarrio and that the officers should be Dennis Frank Reeder, President and Thomas Russell Lombard Treasurer-Secretary.

The capital stock, as stated in the Articles, was to consist of 100 preferred shares of a par value of $100.00 per share and 10,000 common shares of a par value of $1.00 per share; the total being 10,100 shares of a par value of $20,000.00. The Articles further provided that in addition to such shares, the Board of Directors could issue "others, of one or more classes, from time to time, in the form, conditions, amounts, price and value it may deem convenient."

The life of the corporation was fixed in the Articles as 15 years from December 12, 1929. The character of the business to be carried on by the corporation is not stated in the Articles.

XXIII.

On September 30, 1930, there was a meeting of the Board of Directors of said corporation. At that time, by resolution of the Board, there were issued to Dennis Frank Reeder 12,500 common shares and to Robert Kean Morris 2,500 common shares in payment of services rendered to the corporation to date which are estimated to be of an equal value as to stock delivered. There were also issued to Thomas Russell Lombard "15,000 shares of common stock in compensation for his services and as the price of a certain contract for taking sand which he entered into with the Government and which in due time he shall assign to the corporation; the Board estimates the value of his services and of the contract equal to the value of the shares delivered."

It was also resolved at said meeting "to issue 350 shares of preferred stock to be sold at par".

XXIV.

Libelant Lombard is a gentleman having various interests. He carries various bank accounts and each

account is identified with the particular interest to which the funds belong. His bank account for his sand business was designated as "Panama Sand".

XXV.

The Barge here involved was purchased by libelant Lombard from Henry Obarrio in December 1929 for the sum of $2000.00. Libelant paid for the Barge as follows: A check for $200.00 dated Dec. 4, 1929 and signed "Panama Sand, Thos. R. Lombard", and a check for $1800.00 dated December 10, 1929 and signed "Thos. R. Lombard".

86 The barge was thus purchased by Lombard prior to the incorporation of the "Panama Sand Co., Inc."

It does not appear that the Barge was ever transferred to the Panama Sand Co., Inc. by Lombard prior to the collision and loss here involved. It does not appear that the Barge was the property of the Panama Sand Co., Inc. at the time of the collision and loss and it does appear that it was the property of Thomas R. Lombard at such time. Both Reeder and Morris disclaim any ownership of said barge in them or either of them or in the Panama Sand Co., Inc. and both admit that the ownership was at all times in libelant, Thomas R. Lombard personally.

XXVI.

As a result of the collision and sinking of the Barge, it is a total loss as is also its cargo of sand. All reasonable efforts to salvage the Barge itself proved unavailing, but the pumps thereon were salvaged.

XXVII.

The cost of the Barge, as above stated, was $2000.00. The cost of improving the Barge for the purpose of carrying sand, including the placing of a concrete bottom in her and installing pumps thereon was $2590.60. The cost of the pumps was $4366.00 and the cost of piping, valves, fittings, etc. in connection therewith was $768.00. In addition, the cost of freight, insurance, etc. thereon was $237.69. The total cost was, therefore, the sum of $5371.69.

The total cost of the barge fitted for use as a sand barge and equipped with pumps and the connections thereto was the sum of $9962.29.

XXVIII.

The cost of salvaging the pumps and of reconditioning them for future use was the sum of $600.00. None of the piping, valves, fittings, etc. in connection therewith were or could be salvaged.

The net loss on the pumps, fittings, etc. was the sum of $1605.69.

The loss on the barge as reconditioned was $4590.60.

The total loss on the barge and on the pumps, fittings, etc. was the sum of $6196.29.

87 XXIX.

The value of the cargo of sand which was lost was the sum of $125.00.

XXX.

The profits realized from the Barge was the sum of $1000.00 per month. Libelant was without the use of a barge, as a result of the collision, for two months.

XXXI.

Libelant expended monies in an effort to salvage the Barge. It does not satisfactorily appear from the evidence what such expenditures were nor what proportion of such expenditures was for the attempted salvage of the Barge and what proportion thereof was for the successful salvage of the pumps. The salvage charges on the pumps are included in the item of $600.00 set forth in Finding XXVIII above.

XXXII.

At the time of the collision and loss, the value of the Barge reconditioned, as above described, and equipped with pump as above stated was the sum of $9962.29. The Barge being in operation but about three months, there was no appreciable depreciation in her value as thus equipped between the date of her purchase and reconditioning and the date of the collision and loss.

At the time of the collision and loss, the value of the cargo of sand was the sum of $125.00.

XXXIII.

The total damages, exclusive of loss of profits and exclusive of expenditures made in attempting to salvage the Barge itself, sustained by libelant by reason of the collision and loss, is and was the sum of $6196.29 (Finding XXVIII) plus $125.00 (Finding XXIX) or $6321.29.

XXXIV.

As a result of the collision, the Real was damaged in the sum of $650.00.

88 CONCLUSION OF LAW.

On the foregoing Findings of Fact, the Court decides as its conclusions of law that libelant should recover from respondent the sum of $6321.29 together with interest thereon at the rate of 6% per annum from July 31, 1930 and that respondent's cross-libel should be dismissed at respondent's costs.

JAMES J. LENIHAN,
Judge.

OPINION.

We have experienced unusual difficulty with this case. The record is long and involved and so much thereof proves to be immaterial to the ultimate issues that it has occasioned a complete and analytical study of the records, not once, but several times. Once successful, though, in drawing aside the curtain occasioned by what appears to us to be immaterial and sometimes argumentative evidence, we experience no difficulty in reaching the conclusions above set forth.

1. For one thing, the evidence as to the exact place and exact circumstances of the collision is diametrically opposed. Libelant claimed, as we have found, that the collision occurred outside the channel of the Canal and Respondent claimed that it occurred inside such channel. The direct testimony of the witnesses, if relied upon solely, would force a conclusion either way. But when consideration is given to such things as the natural interests of the parties involved, we can and must resort to all the surrounding facts and circumstances and test the testimony of the witnesses in relation thereto.

The record is clear that the Lucky Girl with he tow did enter the Canal on the sea side of the Dredg Las Cruces and that she was attempting to get ove on her proper side of the channel and had reached a point west of the center line of the channel when she sighted the tug Chagres coming out to sea.

In that position, with a heavy tow, it was but natural for her Master to give consideration to the possibilities which might arise if he passed the Chagres abreast of the Las Cruces. To continue his course with a small tug towing a loaded barge almost twice the length of the tug and travelling 1-½ miles per hour might well appear to be dangerous, if in doing so, he would have to maneuver too near the Las Cruces. And in this connection, it might well be, although we do not so find as a definite fact, that it was difficult for the Lucky Girl to speedily maneuver the large loaded Barge. And it might well be, although we do not so find as a definite
89 fact, that the steering of the Lucky Girl to port after she sighted the Chagres was as much due to difficulty in maneuvering the Barge as it was to any contemplated danger, in the mind of the Master, of passing the Chagres port to port abreast of the Las Cruces. In either event, the maneuver was a proper one and the experienced Master of the Chagres, who was a disinterested witness, so construed and interpreted it. It was he who gave the signal for a starboard to starboard passage. His vessel was traveling from four to five miles per hour and he too was towing a barge lashed to his vessel. It seemed to him that, under all the circumstances, the passage would occur abreast the Chagres and that a port to port passage might be dangerous. Whether the slow-going Lucky Girl with her heavy tow would right itself quick enough and get over to the east side of the channel and whether in doing so the passage abreast of the Las Cruces would be safe, were navigation problems to be considered.

And the fact that there was plenty of space abreast of the Las Cruces for a perfectly safe passage port to port of the Lucky Girl and her tow and the Chagres and her tow, does not alter the fact that it appeared to the Masters that a starboard to starboard passage was better and safer under all the circumstances.

The record is clear that the Chagres did pass the Lucky Girl starboard to starboard abreast of the Las Cruces, and that at the time of the passage, the Chagres was in the channel near the west prism line proceeding to sea and the Lucky Girl was about 50 or 60 feet outside the channel proceeding to Balboa. And the record is also clear that this passage was proper, safe, and desirable under all the existing circumstances.

The passage of the Lucky Girl and the Chagres abreast the Las Cruces is not of itself important. But we have set forth the facts thereof in some detail because we think they are essentially material to the determination of the subsequent movements of the Lucky Girl. Then, too, they establish the fact that the Lucky Girl was traveling outside the channel and that fact is established in our mind very largely upon the testimony of the Master of the Chagres who was a disinterested witness and whose proximity to the Lucky Girl in passing made it possible for him to know her position with considerable accuracy.

It was after passing the Chagres that the Master of the Lucky Girl sighted the Real. Bearing in mind the slowness of the Lucky Girl and the fact that she was towing a large barge heavily loaded, what would be more natural than that her Master should keep her on a course outside the channel. The distance between the Lucky Girl and the Real was not so great and the probability that the Real was a much faster vessel, which she actually was, were factors which should cause considerable hesitancy in attempting to

maneuver the Lucky Girl and her heavy tow in to the channel so as to safely pass the Real port to port. In order to get to her proper side of the channel so as to pass the Real port to port, she would have to change her course from straight ahead to starboard and then move slowly from a point 50 or 60 feet outside the channel to a point more than 250 feet in the channel; if she were to get clear over to her right side of the channel, or to a point less than 250 feet in the channel which might give her clearance of the Real in passing but which would leave her on the Real's side of the channel and possibly be dangerous if the Real was traveling near the center. Such a maneuver would take time and would hardly be wise in view of the slowness of the Lucky Girl with her heavy tow and of the probable speed of an oncoming, unencumbered vessel. In this connection, proctors for libelants have, at pages 4 and 5 of their brief, set forth diagrams of the maneuvers based upon the testimony of the various witnesses. They are sufficiently accurate to fairly depict the situation. A study of them together with a consideration of all the facts and circumstances convinces us that the Lucky Girl never did reenter the channel. We think the weight of the evidence forces the conclusion that she continued her course outside the channel and that, in doing so, she pursued the proper and safe course.

On the other hand, we are not at all convinced with the testimony to the effect that the Lucky Girl was in the channel at the time of the collision. One of the witnesses for respondent claims to have sighted the Lucky Girl, which carried the regulation lights and yet he could not tell to which side her tow was lashed. Another claims to have heard signals which obviously were not given. Some of them testified on this trial contrary to testimony given by them before a Board of Inspectors of the Panama Canal. Some of them

testified to the manner of attaching a line after the collision from the Real to the Barge and of towing the Barge in a perfectly impossible manner, under the circumstances, from an alleged point 40 or 50 feet inside the channel to a point 150 feet outside the channel; and all in the space of three minutes.

But all of the witnesses agree that the Real was pursuing a course about 35 or 40 feet from the west prism in the channel. She was, then, near enough to the west prism so that any change in her course towards the west prism as she neared the Lucky Girl would result in her ramming the Barge about 40 or 50 feet outside the west prism. And in ramming her at that point, we can readily understand how she could push the Barge a distance of 100 feet in three minutes to shallow water.

We think the record demands the conclusions we have reached as to the point of collision and as to the responsibility of the Real for such collision.

2. Another matter which became greatly confused was that of the ownership of the Barge. The answer of the Respondents admitted the ownership to be in libelant. When evidence was first offered to prove damages, books, papers, checks, etc. were offered and some of them appeared to have something to do with a corporation known as the Panama Sand Co., Inc. Obviously, if the Barge belonged to the corporation, this libelant could not recover.

We have found the facts as to this situation. There was a corporation formed in December 1929. But nowhere does it appear that this Barge was ever transferred to the corporation and, indeed, it would
91 appear that no stock was ever issued until Sept. 1930, which was some time after the collision and loss. Then, too, it appears uncontradicted that libelant purchased the Barge and paid for it prior to the incorporation.

We have concluded that whatever may have been th ultimate intention as to a transfer of the Barge, th fact is that it was not transferred to the corporation b libelant prior to its loss and that it was the propert of libelant at that time.

True, respondent has introduced evidence that th Panama Sand Co., Inc. was doing business with th Government of the Canal Zone in an effort to get site for a sand bin and to get permission to build such a bin on such site. But that, of course, is far from proving that the Barge was the property of the Com pany and not the property of the libelant.

3. It will be noted that we have made no allow ance for depreciation in the value of the Barge. Since the Barge was purchased in 1929 after which it was reconditioned and since it was only in operation a few months when lost, its value at the time of the collision was not any less than it was at the time of its purchase and reconditioning.

4. While we have made a Finding as to the loss of profits, we do not think there can be any recovery therefor. As stated in the case of The Umbria, 166 U. S. 404, 421, the general rule is:

"that in cases of total loss by collision damages are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision".

Again, at page 422, the Court stated:

"In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs, but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover

the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance; and if the vessel were under a charter which had months or years to run, the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury."

92 5. Decree will be entered pursuant to the above Findings of Fact and conformable with the above Conclusions of Law.

Dated this 13th day of August 1932.

JAMES J. LENIHAN,
Judge.

93 BILL OF COSTS OF LIBELANT.

(Filed August 17, 1932.)

Costs.

Proctor's fee on libel		$20.00
Proctor's fee on cross-libel		20.00
Filing fee		5.00
Entry of Decree		5.00
Marshal's fees		24.80
Clerk's fee on cash deposit		2.50
Premium on release bond		20.00
Premium on cost bond		10.00
Witnesses fees		24.90
6 witnesses 1 day ea.	9.00	
2 witnesses 4 day ea.	12.00	
1 witnesses 2 day ea.	3.00	
Mileage	.90	
Total		$132.20

(Signed) CARLOS ICAZA and L. S. CARRINGTON,
Proctors for Libelant.

Service of a copy of above bill of costs is acknow
ledged this 17th day of August, 1932.

VAN SICLEN & BOGGS,
By (Signed) K. McGUIGAN,
Proctors for respondent.

AFFIDAVIT.

United States of America,
Canal Zone, ss.

L. S. Carrington, one of the proctors in the withi
cause, after being duly sworn on oath says: The fore
going items in the libelant's bill of costs, herein file
are true.

(Signed) L. S. CARRINGTON.

Subscribed and sworn to before me this 17th day o
August 1932.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of the Court.

Note: Marshal's expenses of $15.00 for caretaker o
"Lucky Girl" unpaid.

(Signed) F. H. S.,
Clk.

94 Minutes of August 20, 1932.

Comes William A. Van Siclen, Esq., of proctors fo
respondents and cross-libelant, this 20th day of Augus
1932, and files in open Court his protest to bill o
costs.

And the Court, having listened to the arguments of counsel, refers the matter to the Clerk of Court with directions to him to tax the costs in accordance with law.

95 PROTEST TO BILL OF COSTS.

(Filed August 20, 1932.)

Come now the proctors for Respondent and Cross-Libelant and protest the Libelant's bill of costs in the following particulars:

1. Protest the charge of $20.00 in the bill charged as proctor's fee on cross-libel.

2. Protest the charge of $9.00 charged in the bill of costs to item "6 witnesses 1 day ea."

3. Protest the item charged in the bill of costs as "2 witnesses 4 days ea.—$12.00."

And therefore respectfully ask this Court to require Libelant to set forth in his bill of costs with more certainty and definiteness the names of such witnesses and the days upon which they attended Court.

(Signed) VAN SICLEN & BOGGS,
Attorneys for Respondent and
Cross-Libelant.

96 NOTICE OF CLERK IN RE. COSTS.

(Issued August 23, 1932.)

Mr. Carlos Icaza, Mr. L. L. Carrington, Proctors for libelant cross-respondent.

Messrs. Van Siclen & Boggs, Proctors for respondents cross-libelant.

Gentlemen:

You are hereby notified to be present in my office at the United States District Court Building in Ancon, Canal Zone, at three o'clock p. m. on August 24, 1932.

at which time I will (re) tax the costs in the above-entitled proceedings, pursuant to the direction of the Court made on August 20, 1932.

The libelant is also hereby notified that vouchers for disbursements other than the moneys disbursed to officers of Court, or an affidavit of payment, must be exhibited and filed.

The losing party is also entitled to an affidavit as to the residences of the witnesses and as to the fact that they were actually brought from their places of residence and were actually paid in order that the charges for mileage may be examined.

Respectfully,

F. H. SHEIBLEY,
Clerk of Court.

Acknowledged this 23d day of August, 1932.

(Signed) L. S. CARRINGTON,
VAN SICLEN & BOGGS,
By (Signed) WM. A. VAN SICLEN,
(Signed) CARLOS ICAZA A.

97

AFFIDAVIT IN RE COST BILL.

(Filed August 23, 1932.)

United States of America,
Canal Zone.

Personally appeared before the undersigned, L. S. Carrington, who after being duly sworn on oath says, that at the hearing of the above entitled cause, the following witnesses appeared and testified for the days set opposite their names. Said witnesses' testimony being necessary and material for the Libelant.

Capt. Marcel Martin	4 days
Lt. Byrholt	4 days
Smith	2 days
O'Shea	1 day
Roe	1 day
Morris	1 day
Reeder	1 day
Obarrio	1 day
Morgan	1 day

The witnesses' fees have either been paid or necessarily incurred and the mileage from Balboa to the Court house at Ancon has also been paid or incurred in the sum of 90 cts. The attached bill for premium on bond has been paid in the amount of $10.00 & the balance of $10.00 will be paid.

(Signed) L. S. CARRINGTON,
Attorney for Libelant.

Sub-cribed and sworn to before me this 23 day of August, 1932.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of Court.

98 BILL FOR PREMIUM ON BOND.

(Filed August 23, 1932.)

Boyd Brothers.

Panama, R. P.

August 23, 1932.

Mr. Thomas R. Lombard, Panama:

Premium on Release Bond dated October 17, 1930, covering period October 17, 1930, to October 17, 1931. (Above paid October 17, 1930). $10.00

Premium on above Bond covering period October 17, 1931, to October 17, 1932, due in the amount of 10.00

$20.00

O. K. (Signed) R. J. BOYD.

99 BILL OF COSTS TAXED IN FAVOR OF LIBELANT BY CLERK OF COURT.

(Filed August 24, 1932.)

Costs

Proctor's Docket fees	$ 40.00

Disbursements

Clerk's fees heretofore paid	7.50
Marshal's fees	24.80
Premium on release bond	20.00
Witness fees	24.90
Clerk's fee for entry of decree	5.00
Total costs and disbursements	$122.20

The foregoing costs and disbursements were taxed by the undersigned, Clerk of this Court, in the presence of Carlos Icaza, proctor for libelant cross-respondent and William A. Van Sicklen, proctor for respondents, cross-libelant, at Ancon, Canal Zone, this 24th day of August, 1932.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of Court.

100 Minutes of August 27, 1932.

This cause coming on this 27th day of August, 1932, for hearing on the protest to libelant's bill of costs filed

herein by attorneys for respondents cross-libelant, comes William A. Van Siclen, Esq., of proctors for respondents cross-libelant, in open Court and withdraws protest as to witness fees.

And the Court having listened to the arguments and statements of proctors for the parties sustains the protest as to taxation of $20.00 for proctor's fee on cross-libel, and the bill of costs taxed in favor of libelant by the clerk of Court is amended by striking the sum of $40.00 and inserting in lieu thereof the sum of $20.00 for proctor's docket fee.

And to the said bill of costs there is also added by the Court a disbursement taxable against the respondents cross-libelant in the sum of $15.00, to wit, expenses incurred by the Marshal for caretaker of the Lucky Girl, thereby bringing the total of the costs against respondents cross-libelant to $117.20.

The following decree prepared and submitted by proctors for libelant is thereupon signed in open Court and ordered filed as of this date:

101

DECREE.

(Filed August 27, 1932.)

This cause having come on for trial on July 24th, 1931, and having been concluded on August 4th, 1931, on the libel and answer thereto, and on the cross-libel and answer thereto, and the Court having requested briefs from the parties, which briefs were filed on January 14, 1932, and the Court thereafter having taken same under advisement, and the said Court having on the 13th day of August, 1932, made its findings of facts and conclusions of law, and having filed its opinion on said date, finding that the motorship "Real" was responsible for the damages to the barge mentioned in the libel and the libelant was entitled to

recover from the respondent the sum of $6,321.29 together with interest at the rate of 6% per annum from the 31st of July, 1930, and costs of libelant, and having further found that the cross-libel of the respondent should be dismissed at cross-libelant's costs, it is therefore

Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further

Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliott, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs.

Done, at Akron C. Z., this 27th day of August, 1932.

(Signed) JAMES J. LENIHAN,
District Judge.

102 INDORSEMENTS AS TO SERVICE OF A COPY OF DECREE HEREIN.

(Filed September 2, 1932, by Libelant.)

To Messrs. Van Sicklen & Boggs, Proctors for respondent and cross-libelant in the within cause.

Please take notice that on the 27th day of August 1932, the original of the within decree was entered of record in the Clerk's Office of the District Court at Ancon, C. Z.

(Signed) L. S. CARRINGTON,
One of the Proctors for
Libelant.

Received the within copy of the decree in the within cause and notice of entry this 31st day of August, 1932.

(Signed) VAN SICLEN & BOGGS,
Proctors for respondent and
cross-libelant.

103 PETITION OF HANS ELLIOT CLAIMANT AND CROSS-LIBELANT FOR APPEAL.

(Filed September 10, 1932.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The petition of Hans Elliot, claimant and cross-libelant, herein, respectfully shows as follows:

1. That on or about October 4, 1930, the libelant herein filed his libel in the District Court of the United States for the District of the Canal Zone against the Motor vessel "Real" in a cause of collision, civil and maritime, to recover the sum of $14,438.00 for alleged damages caused the libelant by reason of the sinking of libelant's barge and loss of cargo of said barge, as by reference to said libel will more fully appear.

2. That on or about October 14, 1930, and after having claimed the libeled Motor vessel "Real" and

filed stipulations for costs and value, Hans Elliot as claimant filed his answer to the said libel and petition, denying liability and praying for a dismissal of said libel as by reference to said answer will more fully appear.

3. That thereafter and on or about the 15th day of October, 1930, Hans Elliot filed a cross-libel claiming damages in the amount of $750.00 because of said collision, as by reference to said cross-libel will more fully appear.

4. That thereafter and on or about the 20th day of December, 1930, libelant and cross-respondent filed his answer to said cross-libel, denying all and singular the allegations in the cross-libel contained and praying a dismissal thereof, as by reference to said answer will more fully appear.

5. That for the purposes of trial the libel and cross-libel were consolidated.

104 6. That such proceedings were thereafter had in this case that on July 25, 1931, this cause came on for trial and argument before the Honorable James J. Lenihan, District Judge, at the Court Room of said Court, and at the close of the hearing, the Court took the entire matter under advisement, and on the 13th day of August, 1932, rendered its decision and findings, holding the Motor-vessel "Real" in fault for the collision and damage set forth in the libel and dismissing the cross-libel of Hans Elliot. Thereafter, on the 27th day of August, a final decree was entered in this case, whereby it was ordered adjudged and decreed that the libelant recover of and from the Motor vessel "Real", her claimant and stipulators, the sum of $6,321.29, damages, together with libelant's costs amounting to $117.20.

7. That this claimant, Hans Elliot, is advised and believes that said final decree and the said decision and findings where on it was rendered are erroneous, in that said findings are contrary to the preponderance of the evidence.

Your petitioner therefore prays that it may be allowed to appeal from said decree, rulings and findings to the Circuit Court of Appeals for the Fifth Circuit and that a transcript of record of the proceedings and papers upon which said decree was made, may be sent accordingly to said Circuit Court of Appeals, and that the usual citation may issue in order that the said decree and findings may be fully reviewed and may be reversed, by the said Circuit Court of Appeals, in so far as it orders, finds and decrees the several matters alleged as errors in the assignments of errors herewith filed.

(Signed) VAN SICLEN & BOGGS,
Proctors for Petitioner.

United States of America,
Canal Zone, ss.

Hans Elliot, being duly sworn, deposes and says that he is the petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge information and belief:
105. and that said appeal is not taken for the purpose of delay, but because the petitioner believes that injustice has been done.

(Signed) H. ELLIOT.

Sworn to before me this 9th day of September, 1932.
(Signed) F. H. SHEIBLEY,
(Seal) Clerk of Court.

It is ordered that the appeal herein be allowed as prayed for.

Dated: September 10, 1932.
(Signed) JAMES J. LENIHAN,
United States District Judge.

ASSIGNMENT OF ERRORS.

(Filed September 10, 1932.)

The petitioner, Hans Elliot, hereby assigns error to the proceedings, findings and decree of the District Court in the above entitled action as follows:

First: The Court erred in finding as it did by its finding numbered "IV" that the barge numbered 4584 drew only seven feet of water, such finding being against the evidence of the "Lucky Girl's" Master, he who had the barge in charge.

(Tr. p. 17.)

Second: The Court erred in finding that the "Lucky Girl" with her tow made a speed of only one and one-half miles per hour, such a finding being contrary to the distance testified to by the Master of the "Lucky Girl" that such vessel progressed after sighting the "Real."

(Tr. pp. 15 and 26.)

Third: The Court erred in finding that a line was thrown from the "Real" to the barge, but that such line could not be fastened, whereupon the "Real" pushed the barge in an effort to get it to shallow water, there being no evidence to support such finding, but evidence to the contrary.

(Tr. pp. 14, 41, 134, 163, 184, 185, 194 and 195.)

Fourth: The Court erred in finding that "the collision occurred just off Buoy 11" such finding being contrary to the evidence.

(Libelant's Exhibit "V"; Tr. pp. 7 and 12.)

Fifth: The Court erred in finding that "the distance from the place at which the 'Lucky Girl' sighted the 'Real' to the place of collision was from 800 to 1100 yards," there being no testimony or other evidence to support such a finding but evidence to the contrary.

(Libelant's Exhibit "A"; Tr. pp. 134 and 190.)

107 Sixth: The Court erred in finding that "it would be unsafe navigation for the 'Lucky Girl' with its tow to attempt to get back into the channel" after passing the tug "Chagres" and tow, such finding being contrary to the evidence as to the speed and position of the "Lucky Girl" and tow with relation to the channel and position of the "Real."

(Deposition of C. F. Magee, Respondent's Exhibit "F," Tr. pp. 11, 51, 134 and 190; Libelant's Exhibit "A.")

Seventh: The Court erred in finding that the "Lucky Girl" and her tow continued her course outside the channel after passing the "Chagres" and tow; such finding being contrary to the preponderance of the evidence.

(Deposition of C. F. Magee, Respondents' Exhibit "F", Tr. pp. 134, 181, 184, 196, 193, 197 and 199.)

Eighth: The Court erred in assuming that if the "Lucky Girl" intended to re-enter the channel she must also intend to enter far enough to pass the "Real" port to port, there being no evidence to support this implied, except that the rules allow starboard to starboard passing in the channel.

(Respondents' Exhibit "C" Rules and Regulations Book.)

Ninth: The Court erred in finding, upon the unsupported testimony of the "Lucky Girl's" Master, that the "Real" was solely at fault, when the testimony

of such Master showed there to have been nine men in all upon the tug and barge, all of whom were about the decks and three of whom, it was claimed, shouted to the "Real" a warning, none of whom were called as witnesses.

(Tr. pp. 8, 13 and 14.)

Tenth: The Court erred in finding that the barge was the property of Thomas R. Lombard, the preponderance of the evidence being that the Panama Sand Company was organized and doing business at the time of the collision, and the barge had been sold to and paid for by the Panama Sand Company, a corporation organized under the laws of the Republic of Panama.

(Respondents' Exhibits "B," "C" and "D"; Tr. pp. 122 to 128, inclusive.)

108 Eleventh: The Court erred in finding that the barge was purchased by Lombard prior to the incorporation of the Panama Sand Company, Inc., such finding being contrary to the evidence.

(Respondents' Exhibit "B"; Libelant's Exhibits 3, 5, 10 and 12; Tr. pp. 94, 89 to 127, inclusive.)

Twelfth: The Court erred in finding that the libelant expended monies in an effort to salvage the barge, such finding being contrary to the evidence.

(Libelant's Exhibits 5 and 12; Tr. pp. 76, 77 and 116.)

Thirteenth: The Court erred in finding that the libelant Lombard sustained damages in the amount of $6321.29, such finding being contrary to the preponderance of the evidence.

(Tr. pp. 67 to 76.)

Fourteenth: The Court erred in refusing to allow claimant to amend paragraph "First" of his answer to

libelant's libel, admitting thereby the ownership of the barge to be in Thomas R. Lombard. On the hearing of testimony, it was made to appear that the Panama Sand Company was the owner (Tr. pp. 86, 87 and 88), whereupon claimant moved that he be allowed to amend his answer to deny the ownership of Thomas R. Lombard, as follows, to-wit:

"A. To my knowledge.

Q. What is his name?

A. Mr. Lombard operated the Panama Sand Company.

Q. And that name "Panama Sand Company" was placed there because of the operation of sand by Mr. Lombard, was it not?

A. Correct.

Q. And all these checks from which these vouchers were made are signed by Mr. Lombard, personally, are they not?

A. Yes; every one.

Mr. Carrington:

We renew our offer.

Mr. Van Siclen:

Who comprises the Panama Sand Company—the personnel?

The Witness:

Mr. Lombard.

Mr. Van Siclen:

Solely Mr. Lombard?

The Witness:

You mean who is operating it?

Mr. Van Siclen:
No; who is the Company?

The Witness:
Mr. Lombard, Dr. Reeder, and Mr. Morris.

Mr. Van Siclen:
Then, may it please the Court, I still insist that Mr. Lombard has brought a suit here as sole owner of a barge that he has lost and asks damages for that barge and now we find that that barge belongs to a partner-ship. It may be that he was operating a barge for himself and also barges for someone else. I think Mr. Lombard is the sole party in interest; but if it should prove that the barge belonged to a Company, partnership or corporation, he would be out of it.

Mr. Carrington:
It does not matter what name is carried in connection with this account—not a bit; it refers to one barge; and Mr. Lombard alleges that he is the owner and sole operator of this barge, and these accounts; regardless of how they are carried, the witness testified, pertain to that barge; and he also testified that the checks were signed solely by Mr. Lombard and in his own name—the checks here in these books.

Mr. Van Siclen:
Certainly, in answering the libel, I did admit that Mr. Lombard was the owner. I has no way of finding out anything else, but I now find out Mr. Lombard didn't own the barge, perhaps. I hereby, in open Court, amend that libel and—

Mr. Carrington:
I object. The case is tried on the pleadings on the complaint and answer.

The Court:

The motion for amendment is denied.

Mr. Van Siclen:

I except." (Tr. pp. 88 and 89.)

Fifteenth: The Court erred in not finding the "Lucky Girl" to be unseaworthy when finding, as it did, that the whistle of such vessel was unable to be used, as testified to by the Master of the "Lucky Girl." (Tr. pp. 18, 19, 20, 21 and 34.)

Sixteenth: The Court erred in decreeing the "Real" solely at fault and sustaining the libel and dismissing the cross-libel, in that such decree is based upon findings unsupported by evidence and contrary to the preponderance of the evidence.

(Signed) VAN SICLEN & BOGGS,
Proctors for Petitioner.

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110 PLACITA.

(For Term Month of September, 1932.)

Pleas before the Hon. James J. Lenihan, Judge of the United States District Court in and for the Canal Zone, at the September Term, 1932, for the Balboa Division, begun on the first Tuesday in September, being the 6th day of September, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Hon. James J. Lenihan, Judge, presiding; Hon. J. J. McGuigan, District Attorney; H. A. B. Schwartz, Assistant District Attorney; Hon. John T. Barrett, Marshal; Charles L. Parker, Deputy Marshal; W. C. Todd, Public Defender; F. H. Sheibley, Clerk of Court, and J. J. Walker, Deputy Clerk of Court.

Attest:

(Signed) F. H. SHEIBLEY,
Clerk of Court.

111 MINUTES OF SEPTEMBER 10, 1932.

The petition of Hans Elliot, claimant and cross libelant, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and his assignment of errors having been filed this 10th day of September 1932, and said appeal having been allowed in chambers this day,

It is now ordered in open Court that the supersedeas bond be and is hereby fixed in the sum of $10,000, and that the cost bond on appeal be and is hereby fixed in the sum of $250.

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112 PRAECIPE.

(Filed September 21, 1932.)

T. F. H. Sheibley, Esq.,
Clerk of the United States District Court,
for the Canal Zone.

We hereby request that the record on appeal in the above entitled case shall include the following:

1. Libel.

2. Claimant's claim.

3. Claimant's answer.

4. Claimant's cross-libel.

5. Libelant's answer to cross-libel.

6. Exhibits of libelant numbered 1, 3, 5, 7, 9, 10, 11, 12 and 13-1.

7. Exhibits of claimant-cross-libelant lettered "A," "B," "C," "D," "E," "F," "G" and "H."

8. Finding of fact, conclusions of law and opinion of District Judge.

9. Final Decree.

10. Assignment of error.

11. Bond and Cost Bond.

12. Citation and service.

13. All testimony of libelant taken in Court.

14. Exhibits of Libelant:

1. U. S. Hydrographic Chart, numbered 1.

2. Book stated to be voucher register, it being libelant's Exhibit No. 3.

3. 20 canceled checks, they being libelant's Exhibit No. 5.

4. Book stated to be record of Directors' meeting and a translation, it being libelant's Exhibit No. 7.

113 5. 4 sheets of paper, stated to be Machine Company's bill for machinery installed in barge, it being libelant's Exhibit No. 9.

6. A bill, libelant's Exhibit No. 10.

7. 3 sheets of paper, stated to be a bill, it being libelant's Exhibit No. 11.

8. Payroll, libelant's Exhibit No. 12.

9. Excerpt of Record of Proceedings of Board, libelant's Exhibit No. 13-1.

15. All testimony of claimant-cross-libelant taken in Court.

17. Exhibits of claimant.

1. U. S. Hydrographic Chart.

2. Paper with translation.

3. Letter.

4. Blue print.

5. Deposition of C. F. Magee.

6. Rules and Regulations, The Panama Canal.

7. Estimate.

It is hereby agreed that libelant's Exhibits Nos. 1, 3, 5, 7, 9, 10, 11, 12, and 13-1 and claimant's Exhibits lettered "A," "B," "C," "D," "E," "F," "G," and "H" may be submitted in the original to the Circuit Court of Appeals.

(Signed) CARLOS ICAZA and L. S. CARRINGTON,
Proctors for Libelant.

(Signed) VAN SICLEN & BOGGS,
Proctors for Claimant-Cross-Libelant.

114 COST BOND.

(Title Omitted.)

(Filed September 21, 1932.)

Know all men by these presents, that I, Hans Elliot, of Panama City, Republic of Panama, am held and firmly bound unto Thomas R. Lombard, in the sum of Two Hundred and Fifty Dollars, to be paid to the said Thomas R. Lombard, his heirs, executors, administrators or assigns, for the payment of which well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal and dated the 21st day of September, 1932.

Whereas, Hans Elliot, as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, from a decree of the District Court of the United States for the District of the Canal Zone, bearing date the 10th day of September, 1932, in a suit wherein Thomas R. Lombard is libelant against the Motorship "Real," her engines, etc.

Now, therefore, the condition of this obligation is such that if the above named appellant, Hans Elliot, shall prosecute said appeal with effect, and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

In lieu of sureties on this bond, and as a guaranty of the faithful performance of the conditions thereof, he hereby deposits in the Registry of the Court the aforementioned amount in cash.

H. ELLIOT,
Appellant.

115 Taken and acknowledged this 21st day of September, A. D. 1932.

(Signed) F. H. SHEIBLEY,
(Seal) Clerk of the District Court of the United States for the Canal Zone.

Aforementioned cash collateral of $250.00 received this 21st day of September, 1932.

(Sgd.) F. H. SHEIBLEY,
Clerk of Court.

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116 MOTION FOR ALLOWANCE OF ORIGINAL EXHIBITS TO BE FORWARDED TO THE CIRCUIT COURT OF APPEALS.

(Filed September 21, 1932.)

Comes now the claimant, appellant and moves this Court that an order be entered, as provided for by Rule XIV-4 of the Fifth Circuit Court Rules, allowing libelant's Exhibits numbered 1, same being a Hydrographic chart; 3, same being a book, designated a voucher register; 5, same being 20 canceled checks; 7, same being a book containing a record of Directors' meeting and a translation; 9, same being bills consisting of four sheets of paper; 10, same being a bill; 11, same being a bill, consisting of three sheets of paper; 12, same being a payroll of libelant's; and 13-1, same being an excerpt of Record of Proceedings of Board; also Claimant's Exhibits lettered A, same being a Hydrographic Chart; B, same being paper with translation; C, letter; D, blueprint; E, deposition of C. F. Magee; F, Rules and Regulations, The Panama Canal; G, an estimate; be forwarded to the Circuit Court in the original, and all

of which it has been stipulated by and between the proctors for the respective parties that same may be forwarded in the original.

And that such other and further order be made in the premises as may be necessary.

(Signed) VAN SICLEN & BOGGS,
Proctors for Claimant-Appellant.

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117 MINUTES OF SEPTEMBER 22, 1932.

Come the parties hereto before the Court in chambers, this 22nd day of September, 1932, the libelant and cross-respondent by proctor Carrington, and the respondents and cross-libelant by proctor Van Siclen.

And now on oral motion of respondents/cross-libelant it is ordered that the testimony taken on the trial of this case be filed herein nunc pro tunc as of the 17th day of August, 1931.

And it is further ordered that the motion of respondents/cross-libelant, in re: transmittal of exhibits, filed September 21, 1932, be and same is hereby allowed, and that the exhibits as set forth in the praecipe of the parties hereto, filed herein same date, be transmitted by the Clerk of this Court in the original to the Circuit Court of Appeals with the transcript of record on appeal, and thereafter, upon termination of the proceedings in the Appellate Court, returned to the files of this Court.

118 United States District Court for the Canal Zone, Balboa Division.

Thomas R. Lombard
vs. Civil No. 1028. Hearing.
The Motorship Real, etc.

Before: Lenihan, Jas. J., District Judge.
July 24, 1931.

Appearances:
Icaza and Carrington for Libelant.
Van Siclen and Boggs, for Respondent and Cross-Libelant.

Mr. Carrington:
If Your Honor please, the evidence and findings have already been made by the Board of Commissioners, and, in order to shorten the time, the Libelant is willing to submit those findings and the evidence to the Court, and proceed on our proof of damages, for this reason; that it seems that this case is going to take a pretty long time, and it would save time, if the other side is agreeable. I am only making the suggestion to the Court of my willingness to submit the findings of the Board of Commissioners to the Court.

The Court:
And make that the evidence on both sides?

Mr. Carrington:
Yes, sir.

Mr Van Siclen:
In the first place, the proceedings of the Board of Inquiry is not a matter of evidence, and I certainly would not stipulate that it be received in evidence.

The Court:
If you were both satisfied with it, you could both so stipulate.

Mr. Van Siclen:
I object.

The Court;
The objection is well taken.

It appears from the pleadings that at about 2:00 o'clock in the morning of the date stated in here, or at 2:45, the Motorship Real was proceeding along the channel down here on the way to Taboga. In that vicinity at that time a large dredge was working. As I understand it, the Real was somewhere between some of these buoys 12 or 14, or 10 or 11; anyhow, it was between some of these buoys, and the claim is that
119 under the Rules of the Road it was proceeding properly. The Lucky Girl was coming in at the same time the Real was going out. The Lucky Girl was coming in with a load of sand and tied to the side of the Lucky Girl was this barge, loaded with sand. Now, the claim is that her lights were all right. You have got to pass green to green or red to red, as the case may be, and in meeting the Real, going in the opposite direction, and due to some signals or something there was a change of the course of one of the boats to meet the other vessel, and the result was that the Real smashed into the side of this barge, some feet from the forward end of the barge and crashed a hole in the side of it, and it sank, and, also, the other boat, the Real, was injured or damaged. Of course, that is, in a sense, the plaintiff's case; that is all denied by the respondent. The case, as I understand it, depends upon, first, the proposition of the personnel on the two boats, and their experience or lack of experience, and whether or not they came

within the Rules and Regulations and laws as to their rights in running these separate ships. That is number one. The second proposition is: Just where were these vessels going—just which way—what actually did happen; were they on a straight course? If they were on a straight course we are not bothered very much; they would have to pass green to green or red to red, as the case may be; but if, for some unknown reason, they had to change their course, we have to know what change was made, and why. The third element, as I see it, is the element of damages. If I may suggest to Counsel, I would ask that you proceed with evidence, first, as to the character of the ship the vessel was, telling me all about that; what her description is; the next thing is where she started from and where she was going, and when and what happened; and, finally, and lastly, the question of damages. It seems to me, if we proceed with our witnesses in that order, we would have a complete picture from the beginning to the end.

Mr. Carrington:

In that case, if Your Honor please, it would be necessary for the Libelant (and I don't know, but I believe, the Respondent), to put their witnesses on the stand to give you a description of the barge; and then take the witness off the stand and put him on later to prove the damages because the owner must know the description of the boat and use him later to prove damages.

The Court:

That would be perfectly proper, and I will understand much better, if I find out what kind of ships these were first; then, all about their travel, where they were going and what for, and the collision; and then, finally, the damages.

Mr. Van Siclen:

As I understand it, if it please the Court, the practice of U. S. Courts and British Courts, is to put on the evidence, and an order is then made, and if there is any necessity to go ahead after that, it is up to the party to prove damages prior to final decree. I have come prepared only to submit evidence this morning.

Mr. Carrington:

I think the description of the boat and size is evidence, and we have to put that in.

Mr. Van Siclen:

Yes; that is true. I am speaking, if it please the Court, on the matter of practice. There is an interlocutory order made as to who, if anyone, is liable, and then the party proves up his damages.

The Court:

Is that not the same when hearing is before a referee?

Mr. Van Siclen:

Yes; when the calendar is quite full the Commissioner takes testimony as to damages. The trial as to the liability should be heard before the Court—in a lower Court. The damage is usually tried before a Commissioner; the reason being a heavy calendar.

The Court:

Of course, the whole case can be referred to a Commissioner.

Mr. Carrington:

Yes; that is the general practice.

The Court:

My thought was that the trial was for all purposes.

Mr. Carrington:

That is, I believe, the practice of this Court, heretofore, Your Honor. The trial for all purposes to prove up liability, if any.

The Court:

It may be that some of the evidence would be worthless, but my thought was that this is a damage case in Admiralty—

Mr. Van Siclen:

Except, may it please the Court, I wouldn't like to get off on the wrong track on the matter. I believe we should proceed in accordance with Admiralty practice.

121 The Court:

What have you done heretofore?

Mr. Carrington:

That has been the practice, Your Honor, and that is what Mr. Van Siclen has been saying. We have tried the case from beginning to end—right through—and then the Court makes its decree—first makes an interlocutory order, and then it becomes final. I had one case, Mr. Van Siclen representing the other side, which was tried right in this Court. Of course, there was no necessity of appealing. We had, also, the question of the Ostoria; we had also the question of the boat that burned out here in the Harbor, off Cape Mala, that Judge Kerr tried—one of the most important cases tried in this Court—damages and seamen's claim, everything, was settled in one hearing. The Admiralty Law does not like taking two bites at a cherry. If the cases, in the first instance, are in very busy Courts they are given to commissioners, and they take the testimony in order to aid the Court, and if the Court is too busy it submits the question of

damages, The party may take exceptions as to the facts in the findings, as to the law, and damages; and the whole thing comes up before the Court on exceptions to the Commissioner's reports and findings and the Court hears that.

The Court:

My idea is: Some one is sued here for $10,000 or $11,000 and the other side is cross-libeling for $1,750. I note, furthermore, that the case is a contested one—not an ex parte case. My thought was to get all the evidence in here. I was then going to ask—in fact, I was going to insist that counsel on both sides, after giving them time to prepare suggested findings of fact, suggested conclusions of law, and briefs supporting, in which event both sides would have to have copies of the record for references to the record, to the evidence to sustain their claims, giving both sides plenty of time to except to these findings and briefs of the other side. I think that what we should do is to proceed just as though this were a damage suit, and I think that, in time, you would have your witnesses ready to prove your damage.

Mr. Van Siclen:

Yes; I can get ready to put in my proof of damages, but do I understand, then, that we are to proceed in the ordinary manner of a damage suit and hear the damages? May I have an exception?

The Court:

Yes.

Mr. Van Siclen:

There will not be an interlocutory order made as to the evidence?

The Court:

What I will do, when I finally get to the end of this thing, if I look into the law and I find that
122 an interlocutory order is applicable, I will probably make an interlocutory order, and the next day make a final decree. The Court is trying to get all of the case in at once. We rule now, for the benefit of the Respondent and Cross-Libelant let the record show that the counsel for Cross-Libelant—the Respondent and Cross-Libelant—announce in open Court that they desire to proceed merely with the introduction of evidence on the question of liability; that they do not desire to proceed at this time with any evidence on the question of damages; that the Court rules that in this case all of the evidence, both on liability and damages, shall be taken at this time, to which ruling the Respondent and Cross-Libelant excepts. Is that correct?

Mr. Van Siclen:

Yes.

Mr. Carrington:

Yes.

MR. THOMAS R. LOMBARD, a witness for the Libelant, was called, and being duly sworn testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.

A. Thomas R. Lombard.

Q. Of what country are you a citizen?

A. The United States.

Q. Do you know a Motorship by the name of the Lucky Girl?

A. Yes, sir.

Q. Are you the owner of it?

A. Yes, sir.

Q. Will you please tell the Court what kind of a ship the Lucky Girl was on the 31st of July, 1930? Confine your testimony to the length, breadth, depth, equipment, etc.

A. A diesel engine 35-40 h. p. motor; 42 feet long; 11 ft. 6 in. beam; and about 5 ft. depth—something like that. She is built for heavy-duty service in fishing off the California coast; in the form of a small tug—is very similar to a small tug—wooden hull.

Q. Was she equipped for towing purposes?

A. Yes; she was equipped for towing purposes with a towing deck a little aft of amidships.

Q. For what purpose were you using the boat Lucky Girl on the 31st of July, 1930?

A. She was on regular run of sand from

123 Chame Bar into Balboa.

Q. What vessel was she towing?

A. A steel barge loaded with sand; the barge was about 85 ft. long, 17 ft. beam, draft of about 7 ft. This barge was constructed so that inside of her was built a wooden hopper and it contained the sand. Forward was a centrifugal sand pump attached to a 75 h. p. gasoline-driven pump; aft the same thing.

Q. What kind of a barge was it? Square or—

A. It was a pointed barge; ship shaped barge—German type manufactured barge.

Q. What kind of officers did you have managing or operating the Lucky Girl?

A. I had 2 operators aboard, one of them acting in charge, the other one acting as engineer; with a total crew of nine.

Q. How many men did you have on the barge?

A. At the time of this collision?

Q. Yes.

A. They were all on deck, either on the deck of the barge or on the deck of the tug.

Q. These 9 men that you referred to represent the crew?

A. For the purpose of handling the sand and pumps, both.

Q. Were your officers, that is, was the captain of the Lucky Girl authorized to navigate in Canal Zone waters?

A. He had papers as an operator, Canal Zone waters.

Q. How long before the collision of July 31, 1930, was this Lucky Girl towing sand in this particular barge from Chame Point to Balboa Harbor?

A. How long was she towing sand into Balboa Harbor?

Q. Yes.

A. I think about 3 months.

Q. How many trips a week or a month, or how often did she make a trip from Balboa to Chame and back?

A. Whenever possible, daily. I couldn't give you the exact number of trips she made, because I dont remember how many days they were delayed and they didn't make a trip, but whenever she went out it was a daily trip, out in the morning and back at night.

Q. And the Captain who was in charge
124 on the 31st of July was the Captain of the Lucky Girl during those 3 months?

A. Not of all the time that she was there; previous to that time I had a man in charge named Isadore Ferrata.

Q. Did you, on the 31st of July, get any information about a collision of a launch with your barge?

A. I was waiting for the launch to come in, at the landing, and so was overdue. And I was down there, and was waiting in my car for the boat to come in. Finally, the tugboat came in without the lighter. The operator, Smith, reported to me that they had been run into by a boat called the Real, just outside of the channel, Buoy 9, and sank.

Q. Did you go out there?
A. I went out to her.
Q. Did you find the barge afloat or submerged?
A. She was on the bottom.
Q. Is she still there?
A. The barge is still there.

Mr. Carrington:
I will call Mr. Lombard later on the question of damages.

Cross Examination.

(Questions by Mr. Van Siclen):
Q. Are you the sole owner of the Lucky Girl?

Mr. Carrington:
I object to that, as it has been admitted by the respondent that he is the owner.

Mr. Van Siclen:
This is cross-examination.

The Court:
Where has it been admitted?

Mr. Carrington:
In the answer; the very first answer to the Libelant.

The Court:
Sustained.

Mr. Van Siclen:
Exception.

Q. Now, Mr. Lombard, you say you had a crew of 9 men on the Lucky Girl?

A. The Lucky Girl and the barge were both together at the time of the collision; the Lucky Girl was alongside.

Q. At times when you did not tow the barge, how many did you have on the Lucky Girl?

A. At the time referred to she was alongside.

Q. At the times when you did not tow
125 the barge, how many did you have on the Lucky Girl? When you were running light? What was the Crew?

A. Three men.

Q. Is that what the certificate calls for?

A. I don't know.

Q. The boat is certificated, though?

A. Yes; she has a license to operate in Balboa.

Q. Yes; and also that certificate states how much of a crew she carries and so forth?

A. Not that I know of. I am not, frankly, I don't know those things; I don't handle that part of it.

Q. You say the barge is steel?

A. Yes; with concrete wooden bottom.

Q. In other words, merely the sides are of steel?

A. Yes.

Q. Does it have any bulkheads?

A. Yes; forward and aft.

Q. Are they transverse bulkheads or longitudinals?

A. Athwart ship.

Q. In other words, transverse?

A. Yes.

The Court:

What kind of a looking thing is a transverse bulkhead? How does it look?

Mr. Van Siclen:

It is quite similar to a wall. A transverse bulkhead runs from one side to the other. What we refer to as a bulkhead is very much like a wall in a house.

The Court:
Thank you.

Q. So in addition to the 3 men comprising the crew of the Lucky Girl you maintained a crew of 6 men on the barge. Is that correct?
A. Yes.
Q. They were not members of the crew of the Lucky Girl?
A. They worked wherever they were necessary.
Q. The purpose was to work about the barge loading sand and unloading sand. Is that so?
A. At the point of loading, all hands as-
126 sisted in loading, and all hands assisted in unloading. At the particular time they were all on deck, getting ready to unload, and the boats were alongside.

(Witness excused.)

FENUEL SMITH, a witness for the Libelant, was called, and being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. Carrington):
Q. State your name.
A. Fenuel Smith.
Q. What is your occupation?
A. Operator.
Q. On what boat are you working now?
A. Cauca.
Q. Running between where?
A. Cristobal and Colombia.
Q. Were you the operator of the Motorship Lucky Girl on July 31, 1930?
A. Yes.

Q. Where was the Lucky Girl operating on that day? Between what points?

A. Between Tabercilla Island and Balboa.

Q. Where was she coming from?

A. Tabercilla Island.

Q. Is that where you went to get sand?

A. Yes.

Q. How long had you been operating the Lucky Girl?

A. Three months.

Q. You are licensed by The Panama Canal?

A. Yes; The Panama Canal.

Q. When did you first get your license?

A. 1924.

Q. How long have you been operating motorboats in Canal Zone waters?

A. 6 years.

Q. On the morning of the 31st of July where were you coming from and where were you going?

A. I was coming from Tabercilla Island into Balboa Harbor.

Q. About what time of the morning did you enter Balboa Harbor?

A. 2:45.

127 Q. Did you enter the channel that morning when you came from Tabercilla Island?

A. Yes.

Q. At what point in the channel did you enter?

A. At Buoy 5.

Q. I am handing you a chart marked Libelant's Exhibit No. 1. (Handing witness chart.)

Mr. Carrington:

Does the respondent admit this is an official chart of the Panama Canal.

Mr. Van Siclen:

Yes; I would like to have it identified as a United States Hydrographic Chart. I have no objection to its admission in evidence.

The Court:

Let the record show that Libelant's Exhibit No. 1 is a Hydrographic Chart of the Panama Canal.

The said Chart was admitted in evidence as Libelant's Exhibit No. 1.

Q. I hand you a U. S. Hydrographic Chart, identified as Libelant's Exhibit No. 1, and I will ask you to point out to the Court where is Buoy 5, where you entered the channel.

A. (Examining Chart.) Right there (indicating). (Point indicated by witness was marked as "A").

Q. After you entered the channel at Buoy 5, what course did you take?

A. Direct from me (indicating).

Q. You entered the channel at the edge of the channel did you?

A. Yes.

Q. Did you stay along the edge or go further into the channel?

A. I started to go in when I saw the towboat was coming out.

Q. How far had you gone in when you saw the towboat coming out?

A. Just about 20 yards from the entrance.

Q. And about how far down the channel had you traveled in about 20 yards?

A. About 20 feet inside.

Q. Then you saw the Chagres coming out?

A. Yes.

Q. At about what point did you see the Chagres?

A. About the center of the channel.

Q. Where was the Chagres coming? Was it past Buoy 9?

A. I didn't get to Buoy 9.

Q. Indicate on the Chart where you saw it.

128

A. There is Buoy 9 (indicating) and here is where he was (indicating place marked "B").

Q. Was there any obstruction between the Chagres and yourself?

A. The dredge.

Q. What dredge?

A. The Cruces.

Q. At what point was the dredge, and on which side of the channel?

A. It was right here (indicating point "C" on chart).

Q. Then the dredge was on your right hand, was she not?

A. Yes, sir.

Q. Was the dredge operating?

A. Yes.

Q. After you sighted the Chagres what happened?

A. She blew me 2 short blasts on her whistle.

Q. What did that indicate to you?

A. To go back over to the left.

Q. Did you do that?

A. Yes.

Q. Where did you go?

A. Outside the channel.

Q. About how far?

A. About 60 feet.

Q. And where did you meet the Chagres?

A. About abreast of the dredge.

Q. And she was then in the center of the channel?

A. Yes; in the center of the channel.

Q. And you met the Chagres abreast of the Dredge?

A. Yes.

Q. Would that be here (indicating point marked "D" on chart)?

A. Yes.

Q. Show the Court where you were with the Lucky Girl at the time you met the Chagres.

A. Outside about 60 feet (indicating point marked "E" on Chart).

Q. At that time did you have the barge
129 in tow?

A. Yes, sir; alongside.

Q. How was the barge attached to the towboat—the Lucky Girl?

A. At the stern of the towboat the Lucky Girl was sticking out behind the barge about 10 feet.

Q. And the barge was about 85 feet long was it not?

A. Yes, sir.

Q. About how much of the barge was extending beyond the bow of the Lucky Girl?

A. About 50 feet.

Q. After you passed the barges did you observe anything—any other vessel—in the channel coming?

A. I saw a light coming—one head light and a green light.

Q. About how far away?

A. About 500 yards.

Q. How far down the channel—down outside of the channel—had you traveled before you saw this white and green light? How many yards?

A. Nowhere at all; as soon as we got abeam of everything we saw that vessel.

Q. Had that light yet reached to Buoy 9?

A. It is impossible—I couldn't tell you; no, she didn't get to Buoy 9.

Q. What did you do?

A. I continued my course.

Mr. Carrington:

I will mark Buoy 9 on the Chart with the letter "F". (Marking on chart.)

Q. What did you do when you saw this light—white and green lights—coming down the channel?

A. I continued my set course in following the range light.

Q. At that time did you have the buoy lights on your right hand or left hand?

A. On my right hand.

Q. You were still outside the channel?

A. I was still outside the channel.

Q. Then what happened?

A. She came on down.

130 Q. Who do you mean?

A. This boat—this other boat—came on down, and as soon as she got about 50 feet away from me she turned over toward me.

Q. Toward you?

A. Yes.

Q. What lights did you see when this boat turned towards you?

A. I saw the red and white then.

Q. And then what did you do?

A. I stopped my engine and backed astern full speed and at the same time she came in.

Q. And when you saw her turn towards you, showing the red light, did you conclude that there was going to be a collision?

A. Sure.

Q. What boat did you subsequently discover was the boat with the white and green lights that you first saw? What was the name of the boat?

A. Did I know it when I first saw her?

Q. What was the name of the boat that you saw, on which you first saw the white and green light and, subsequently, a red and white light?

A. The Real.

Q. When the Real struck you, what movement was your boat, the Lucky Girl, undertaking?

A. She was going along very slow.

Q. What was the Lucky Girl doing?

A. She was going astern.

Q. She was going astern at the time?

A. Yes.

Q. Did any of the members of your crew say or do anything immediately before the Real struck the sand barge?

A. There was 3 Spanish fellows in the forward end of the barge and they started to yell out.

Q. Was that before the Real struck the barge?

A. Yes.

Q. What happened to the barge?

A. A hole was pushed in her and she started to sink.

Q. What did you do?

A. I said to the Captain of the Real
131 "Throw me a rope and assist me to get her farther out on the flat." He did so, but it wasn't any good; she went down in the space of 3 minutes.

Q. Where were you at the time the Real struck the barge?

A. On the left hand side of the barge.

Q. I mean in relation to the channel.

A. She was outside the channel.

Q. And is that where the barge sank?

A. Yes; that is where she sunk.

Q. And is she still outside the channel now?

A. She is still there.

Q. How many men did you have on the barge?

A. Nine.

Q. I mean on the barge itself.

A. Six.

Q. Was the barge fully loaded?

A. It was fully loaded.

Q. With what?

A. Sand.

Q. About what speed was the Lucky Girl making coming in?

A. About 1½ per hour.

Q. What kind of a tide was it? Flood or ebb?

A. The tide was coming in.

Q. It was a flood tide?
A. Yes.

The Court:
When you say "1½" what do you mean? Knots pe hour?

A. 1½ knots an hour.
Q. Was the barge fully loaded with sand?
A. Yes. sir.
Q. Do you know how much sand the barge takes
A. No, sir.
Q. Do you know the approximate weight of it
A. No.
Q. How much time elapsed from the time you first saw the light of the Real in the channel up t the time that he collided with the barge?
A. How many times?
132 Q. How much time? How many minute from the time you first saw her until sh struck you?
A. About 4 minutes.
Q. Did the Real give you any signal as to her in tention—what she wanted to do?
A. No.
Q. Did she notify you in any way she was going t change her course to cross your bow?
A. No, sir.
Q. Was the Master at the helm at the time sh struck you?
A. I don't know.
Q. Did you see him coming from any part of th ship after the collision?
A. Yes.
Q. Where did he come from?
A. From the stern end of the ship.
Q. Did he have anything in his hand at that time
A. A flash light.

Q. Did the Real check her speed any?
A. Not until she hit the barge.
Q. Was there anybody on the bow of the Real watching? Any watch on the bow to see what was going on ahead?
A. I didn't see anyone.
Q. Who was navigating your ship?
A. I was.
Q. Were you at the helm?
A. Yes.
Q. Did you have a man at the bow of the barge?
A. There was a man at the bow of the barge and one steering and the other three were attending to the pump.

Cross Examination.

(Questions by Mr. Van Siclen):
Q. What did you say your name was?
A. Fenuel Smith.
Q. You have been doing boat work for a long time, Capt. Smith?
A. Yes, sir.
Q. How long were you an operator?
A. Six years.
133 Q. Where did you get your operator's license?
A. Cristobal.
Q. And you operated at Cristobal?
A. At the boat landing.
Q. For the Canal?
A. For the Panama Canal.
Q. Why did you leave the Canal?
A. I got a bigger job—more money.
Q. Was that the job on the Lucky Girl?
A. Yes.
Q. And how long had you been operator on the Lucky Girl?
A. Three months.

Q. And now you say you are operator on the Cauca?

A. Yes, sir.

Q. That is a bigger vessel, is it not?

A. Yes, sir.

Q. You operate the engines?

A. I run the engines; yes.

Q. You don't operate the deck, and navigate?

A. Not on the Cauca.

Q. You did on the Lucky Girl?

A. Yes.

Q. You say you came in the channel on the morning of July 31st. You came in the channel at Buoy No. 5?

A. Yes.

Q. What does this F. W. M. here mean?

Mr. Carrington:

That is Buoy 9.

Q. You don't read?

A. Yes; I read.

Q. What does this F. W. mean?

A. I don't know.

Q. You came in at Buoy No. 5, at the point marked "A"?

A. Yes.

Q. How far away from the Buoy were you? What was the direction in the harbor?

A. I don't know.

Q. You haven't any idea?

134 A. No.

Q. Why did you go in at Buoy 5? Why did you go in the channel at Buoy 5?

A. So as to come in.

Q. In where?

A. Into the harbor.

Q. Why didn't you come in at Buoy No. 9?

A. I didn't have to.

Q. Why didn't you? Of course you didn't have to come in at Buoy No. 9.

A. To come in.

Q. You came in at Buoy No. 5. Why didn't you come in at Buoy No. 9?

A. I saw the next boat coming out.

Q. You came from Chame?

A. Yes.

Q. And made the shortest way across from there?

A. Yes.

Q. Wouldn't the shortest line have reached Buoy 9, instead of Buoy 5?

A. It was in the night, and there is a bank—

Q. You came in there in order to avoid the shoal waters?

A. Yes.

Q. You knew there was deep water in the channel?

A. Yes.

Q. And there was not outside the channel, was there?

A. Yes.

Q. How much does your boat, the Lucky Girl, draw?

A. A mile and a half an hour.

Q. How much was it drawing?

A. 7 feet.

Q. How much was the barge drawing?

A. Nine.

Q. The barge was drawing 9?

A. Yes.

Q. The barge was drawing 2 feet more than the Lucky Girl?

A. Yes.

Q. Do you know the rules of navigation?

135 A. Yes, sir.

Q. Where do you find the rules of navigation for the Panama Canal?

A. Where do I find them?

Q. Yes.
A. In the rule book.
Q. Where is it?
A. An instruction with the Canal Zone supply.
Q. Is this it (showing book to witness)—a book like that?
A. No, sir.
Q. Like this, is it? (Showing another book to witness.)
A. Yes.
Q. You are acquainted with those rules?
A. Yes, sir.
Q. You came in the channel, you say, and you saw the Tug Chagres going out, did you?
A. Yes.
Q. And the tug blew you 2 whistles?
A. Two short blasts.
Q. What did you do?
A. Went back to the left.
Q. Did you blow a whistle?
A. No.
Q. Why not?
A. The whistle was on the air tank and I could never get to it in time.
Q. You couldn't get to it in time?
A. Yes.
Q. Where did you have to go to get to the whistle?
A. Down in the engine room.
Q. And it was closed off, wasn't it, because if you used the air on the whistle, it would interfere with the working of the engine?
A. No.
Q. Why was it closed at this time?
A. I was coming away from the ..... and closed it off, and when I got to the end of the channel I open it up; I never got to it at the time the Chagres blew.

Q. You blew no whistle at this time?
136 A. It could blow.
Q. You couldn't blow it—
A. Because the air was closed off.
Q. Couldn't the whistle be blown?
A. Sure.
Q. When the Chagres blew to you, you didn't answer them?
A. No.
Q. Because you didn't have any air on the whistle?
A. I couldn't blow the whistle—no air.
Q. He blew you 2 whistles?
A. Yes.
Q. Under the Rules of the Road, that you are acquainted with, what did that mean to you?
A. To go toward your left.
Q. For you to go to the left?
A. Yes.
Q. That is the rule of the Canal, is it?
A. Yes.
Q. What Rule is that?
A. Rule 50.

Mr. Van Siclen:
I don't think so; it is Rule 55.

Mr. Carrington:
It is Rule 55. You can't expect him to remember the number of the Rules.
Q. You read Rule 55. (Handing book of Rules to witness).

(Witness then read from Book of Rules as follows:)

Rule 55. Vessels meeting in Canal: In the canal, vessels meeting shall pass to the port side of each other, unless there be some special reason to the contrary, and passing to starboard is authorized by the

Canal pilots. When two vessels sight each other in a Canal channel less than 800 feet wide they shall, when about a mile apart, reduce speed and proceed cautiously until they have passed and cleared.

Q. There is nothing about whistles there at all?
A. No.
Q. You find the Rule that tells about the whistle.

Mr. Carrington:
I don't think the witness has to look for the rules in regard to whistles. Counsel is questioning him.

The Court:
He testified there was a rule; he is now testing him.

137 Mr. Van Siclen:
He, also, if it please the Court, testified that he was acquainted with the rules.

The Court:
Yes.

A. It is Rule 80.
Q. Read Rule 80.

The witness then read the following:

Rule 80. Sounding Signal Devices: Self-propelled and sailing vessels navigating the waters of the Canal Zone shall be provided with efficient signal devices as follows: (a) Self-propelled vessels over 65 feet in length, a whistle or siren, sounded by steam or some substitute for steam, so placed that the sound can not be intercepted by any obstruction; (b) self-propelled vessels under 65 feet in length, a whistle or other mechanical sound-producing device, capable of making a blast of at least two second's duration; (c)

sailing vessels over 30 feet in length, a fog horn. Vessels of these classes shall each be equipped also with an efficient fog bell.

Q. You were not able to respond to that rule at the time?

A. Yes; the whistle; I did so by going outside of the boat; did so by maneuvering.

Q. You couldn't answer with the whistle at that time?

A. No.

Q. In so far as the Lucky Girl being navigated at that particular time, she was navigating in violation of Rule 80, did you say?

A. Rule 80; yes.

Q. Isn't that so?

A. I was not violating it?

Q. What were you doing? You couldn't blow the whistle, could you?

A. No.

Q. And the Rule says you should have a whistle you can blow?

A. No.

Q. You didn't have one?

A. I couldn't get to it at the present time.

Q. It couldn't be blown?

A. Sure it could.

Q. Why didn't you blow it?

A. Because I didn't blow.

Q. Why didn't you blow?

(No answer.)

The Court:

Witness will answer the question.

A. The air tank was outside and I didn't blow.

Q. Had you ever made any complaint about the whistle to Mr. Lombard?

138

A. No.

Q. And it is a fact that you did not blow to th Chagres, is it not?

A. No.

Mr. Carrington:

He has answered that about ten times already. I object.

The Court:

Objection overruled. This is cross-examination.

Q. (Showing witness Libelant's Exhibit No. 1.) Now you see these marks here drawn on the Chart. What are these numbers?

A. Indications.

Q. Of what?

A. Depths of water.

Q. How much water does this show here (indicating) at Buoy 9?

A. (Indicating.) Here is Buoy 9.

Q. How much does it show at Buoy 9 (indicating)?

A. Here is Buoy 7 (indicating) it is 17 feet here (indicating), 15 feet here (indicating), and 5 here (indicating).

Q. How much water is there down by Buoy 9?

A. It is not marked here.

Q. You don't say whether it is—3 or 4 feet?

A. That is away over here (indicating).

Q. Down here by Buoy 11 how much water is there?

A. By Buoy 11?

Q. Yes.

A. 5 feet.

Q. What is this mark here (indicating)?

A. That is where the barge was.

Q. That is where you say you were proceeding around there?

A. Yes.

Q. Your barge was drawing 9 feet and the tug 7?
A. We were proceeding here—right here (indicating).
Q. How far out is Buoy No. 5?
(No answer.) (Witness consults Chart.)
Q. Have you found out?
A. No; I don't know.
Q. You were entrusted with the navigation of this boat?
139 A. Sure I was.
Q. But you don't know how to find distance on a map; you don't use those things? Is that what you use to find distance?

(The witness measured on chart, Libelant's Exhibit No. 1.) (The witness did not find the distance.)

Q. You couldn't possibly go where there was only 5 feet of water, could you?
A. No.
Q. What is the least depth of water you would take that tow through?
A. 11 feet of water.
Q. You want 11 feet?
A. Yes.
Q. In anything less than that you wouldn't go?
A. No.
Q. I show you Libelant's Exhibit No. 1, the same being a chart, and ask you if at a point 60 feet outside of the channel at Buoy 9, marked with an "F", there is 12 feet of water? Is there?
A. Beside the buoy there is 12 feet of water.
Q. Outside of the buoy?
A. There is.
Q. There is? You say there is?
A. Yes.
Q. What is the direction of the channel? Is it south and east or north—
A. I never noticed that.

Q. You don't know the direction?

A. I never noticed the direction.

Q. Yet you run in and out all the time?

A. I don't have to use a compass in the channel there.

Q. You are the operator of a boat that is being used for commercial purposes. Don't you think you should know something about a compass and directions—

A. I know a compass, but I never use it in coming in and going out.

Q. What's the objective point

A. West by south?

Q. You don't know a compass. You testified on direct examination that you saw the Real only 4 minutes before the collision?

A. Yes.

Q. Then, looking at Libelant's Exhibit No.
140 1 tell us where you were at the time you first saw them.

A. Seen what?

Q. The Real.

A. I was abreast of the Chagres.

Q. You were abreast of the Chagres?

A. Yes.

Q. Where was the Chagres?

A. She was going out.

Q. In what part of the channel was she?

A. In the middle of the channel.

Q. By Buoy No. 1?

A. Just passing Buoy 9, going out.

Q. Then you had gotten by the dredge, had you?

A. I was on the other side of the channel—

Q. You had gotten by the dredge; the dredge was behind you then?

A. When we passed, no; we all three met together.

Q. The dredge was at Buoy 9?

A. Outside from Buoy 9.

Q. Was it south or north of Buoy 9 where the dredge was?

A. Outside of Buoy 9, going out of the channel.

Q. But the dredge?

A. She was outside of Buoy 10.

Q. Outside of Buoy 10?

A. Yes.

Q. Here where you have this mark on the chart (indicating on Libelant's exhibit No. 1) is where she was?

A. Yes.

Q. And that is South of Buoy 10, is it not?

A. I don't know about south.

Q. How wide is the channel? Do you know how wide it is?

A. I have no idea.

Q. If I told you it was 1,000 feet, would you believe me?

A. I can.

Q. Do you believe it is 1,000 feet?

A. Yes.

Q. How wide is the dredge? Do you
141 know how wide the dredge is?

A. No; I don't.

Q. Would it be more than 100 feet?

A. I have never been aboard.

Q. You could look at it.

A. I never have to notice that.

Q. Will you say it is 100 feet wide?

A. No; I won't.

Q. Will you say it is 50?

A. I cannot tell.

Q. Will you say it is not more than 100?

A. I don't know anything about it.

Q. How wide is the Tugboat Chagres?

A. I don't know.

Q. About how wide?

A. I don't know, either.

Q. How wide is the Lucky Girl?
A. She is 11 feet, I think.
Q. 11 feet wide?
A. Yes.
Q. And the dredge, you say, is 100?
A. I didn't say that.
Q. The channel is 1,000 feet wide, you said?
A. You said that.
Q. Is it 1000 feet wide?
A. I don't know it; I will not say that.
Q. You don't know anything about the channel all, do you? Not a thing. Yet you say you operat up and down for 3 months. Is that so?
A. Yes.
Q. In that 4 minutes of elapsed time after y saw the Real, how far did you go then? How did your boat move ahead? One mile or—
A. No.
Q. She went about 30 yards from the light?
A. From Buoy 9.
Q. And you saw her at Buoy 9—
A. No; I was abreast of the dredge wh
142 I saw her.
Q. And where was she then?
A. She was coming down the channel.
Q. Whereabouts in the channel, with reference some other buoy?
A. I couldn't tell you.
Q. You do know it was 4 minutes from the ti you saw her until the collision?
A. Yes; not when I seen her, from the light, Bu 9, from there to the time she hit me was about minutes.
Q. You want to change your time?
A. No; I don't want to.
Q. How long had you seen the Real's lights?
A. About 7 minutes.

Q. About 7 minutes. And where was the Real when you first saw her?

A. She was coming down the channel.

Q. Whereabouts in the channel?

A. I couldn't tell you.

Q. Where were you?

A. I was outside.

Q. Where in reference to the buoys in the channel?

A. I was outside the channel then.

Q. With reference to some point where were you? We must know some point—we must know where you were, in order to know where your boat was when you first saw the Real.

A. I was 60 feet outside of the channel.

Q. What part of the channel were you 60 feet outside of?

A. On the left hand side of the channel.

Q. Mark on the chart (Libelant's Exhibit No. 1) where you were when you first saw the Real.

A. You mean when I first saw the Real?

Q. Yes.

A. I was right here (indicating).

Q. Where that "F" is?

A. Yes.

Q. Where was the Real?

A. She was coming down the channel here to me (indicating). I couldn't give you the right
143 point—the right distance.

Q. Measure the distance from there (indicating on chart)—I will measure the distance from there to where the wreck is.

A. Yes.

Q. That is right is it?

A. Yes.

Q. That is a matter of 800 yards?

A. Yes.

Q. And from this point marked "F" to where you collided with the Real there was 7 minutes elapsed?

A. Yes.

Q. And the distance between those 2 points
800 yards?

A. Yes.

Q. And your boat makes a mile and a half in
hour. Is that so?

A. Yes.

Q. And it makes 800 yards in 7 minutes?

A. Yes.

Q. Every 7 minutes you go 800 yards. Is that s

A. Yes; with the tide.

Q. What?

A. Along with the current coming in.

Q. When were you going to get back in the cha
nel?

A. After I passed the Real.

Q. Where would you have passed the Real? He
where you met them?

A. Yes.

Q. You were right there (indicating on chart

A. Yes.

Q. When you got by him you were going to go
were you?

A. Yes.

Q. Were you going to walk over that 5 foot spo

A. Yes.

Q. You were out 60 feet, were you?

A. Yes.

Q. And to get in now from where you had t
collision

Mr. Carrington:

I want to have Counsel get this thing straight.
think it would be to the advantage of t
144 Court to measure this distance to the ed
of the channel. I know if you measure th
you are over 400 feet from the channel don't lea
the Court with the impression that he is 5 feet fr
the channel.

The Court:

That may be corrected on redirect.

Q. Did you blow the Real a whistle?

A. No.

Q. Why not?

A. Because I was outside the channel.

Q. For that reason you didn't have to blow?

A. No.

Q. When you are going back and forth to Chame you don't blow whistles?

A. Yes.

Q. Why? You are not in the channel then.

A. I don't have to.

Q. You don't have to blow?

A. No.

Q. There is no rule that says you should, or anything like that?

A. Sure.

Q. Is there any rule that says you must or must not blow a whistle when you are out here—out of the channel, or somewhere else?

A. I know the different rules of the—

Q. Did you ever hear of the International Rules?

A. No.

Q. You never heard of International Rules. Did you ever hear of Inland Rules?

A. Land Rules?

Q. Inland rules?

A. No, sir.

Q. The only rules you know are those of The Panama Canal?

A. Yes.

Q. You think you know them, do you?

(No answer.)

Q. I show you a book (handing book to witness) entitled Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters, and I ask you to read Rule 88-1 for the record.

The witness then read the following:

145 88.1. The preceding Rules and Regulations are in accordance with the International Rules of the Road; and when any conditions of navigation arise that are not covered herein, the International Rules of the Road shall apply.

Q. Now you know there are International Rules.
A. Yes. I never examined them.
Q. What lights was the Lucky Girl burning?
A. She was burning her towing lights and her regular running lights.
Q. What is a towing light?
A. 3 lights in direct—
Q. 3 lights?
A. In an up-and-down direction, one above the other, 3 feet apart from each other.
Q. Did you have these 3 lights burning, up and down?
A. Yes, sir.
Q. How far apart were the lights?
A. 3 feet apart.
Q. Each light was three feet apart and each a white light?
A. Yes.
Q. What other lights did you have?
A. Port and starboard lights and a stern light.
Q. What colored light is a port light?
A. Red.
Q. And the starboard?
A. Naturally, it would be a green.
Q. What lights did you have on the barge?
A. 3 lights on the barge; one on the bow about three feet from the deck and one in the middle of the barge on a davit about 15 feet from the deck, and there is a stern light about 5 feet from the deck.
Q. How do you know to put lights on the barge?
A. I read it in the Regulations.

Q. And you did it because the Regulations say so. Is that so?

A. Yes.

Q. And you did it like the Regulations say?

A. Yes.

Q. (Hands book to witness.) I show you this book of rules and I will ask you to read paragraph B, down to there (indicating).

146 Mr. Carrington:

I would like to know what the witness is going to read.

Mr. Van Siclen:

Page 25, Rule 69, Section B.

The witness then read the following:

Rule 69. Lights for Vessels Being Towed: (a) * * * (b) Tows made up of barges, scows, etc., when being towed by a hawser in tandem, shall each carry a white light on the bow and another on the stern; and when such tow is made up of two or more craft abreast a white light shall be carried on each corner of such tow. Tows made up of barges, scows, etc., when towed alongside the towing vessel, shall display a white light on the outer bow and another on the outer stern. * * *

Q. And you say you had one light on the bow?

A. Yes.

Q. In front. And you had another one on the davit in the middle of the boat?

A. Yes.

Q. And you had a third?

A. On the stern end of the barge.

Q. In the center. You didn't have any out on the buff of the barge, did you?

A. Yes; yes, it is a sharp barge; you couldn't put it on the corner.

Q. Is that the shape of the barge? (Showing paper to witness.)

A. Yes; it bends over this way (indicating) and over like that (indicating) and like that (indicating). The light is this one on the corner here (indicating) and this one is here (indicating).

Q. You said, on direct examination, that you were following the range lights.

A. Yes.

Q. That is what you were doing?

A. Yes.

Q. Again, for the benefit of the Court, show on this chart (Libelant's Exhibit No. 1) where the range lights are.

A. Here is the lower one (indicating on chart) and here is the higher one (indicating) which directs the center of the channel.

Q. You also stated that you knew that a collision was about to occur.

A. When I saw the boat—the green—the red light of the Real.

Q. You said you knew a collision was about to occur?

A. Yes.

Q. Did you blow any whistle at that time?

A. No.

Q. Why not?

A. I was operating the engine then, after
147 I saw she turned over to me, to stop the engine, and I reversed full speed astern and I didn't have time to blow any whistle.

Q. Did you blow before that?

A. No.

Q. If you had blown a whistle, what whistle would you have blown?

A. Two short blasts.

Q. What would that mean?

A. Direct him to his left.

Q. Is that the Rule?

A. No, it is not the rule, but there is.....there in navigating the Canal and I saw a danger it is then the right signal supposed to operate on the left hand side; moreover, in coming in the channel there was an obstruction on the other side of the channel and a towboat going out in charge of a Captain of The Panama Canal, and he advised me to go outside.

Q. He advised you?

A. To keep to the left hand; I did so.

Q. He advised you with a megaphone?

A. No; he gave me 2 short blasts of his whistle.

Q. That's what you mean by "advise"?

A. Yes.

Q. How far inside of the channel was the Real when you first saw her?

A. I couldn't tell.

Q. You know he was inside the channel?

A. Sure, he was inside.

Q. And what lights of the Real could you see?

A. At first?

Q. Yes.

A. When I first saw her?

Q. Yes.

A. I saw a green light.

Q. And what other light?

A. A white light.

Q. And a green light?

A. Yes.

Q. And that indicated to you what?

A. That she was coming on my—

148 Q. Coming out?

A. Yes.

Where was the Real at that time in the channel.

A. I couldn't tell.

Q. But you do know you seen a green and a white light?

A. Yes; it shows she is coming on the other side of me.

Q. You don't know where that green light and that white light were, do you?

A. No; I knew a green and a white light was on a boat.

Q. You don't know where it was with reference to your boat or the channel, or anything?

A. I couldn't tell that.

Q. What did that indicate to you—this green and this white light?

A. That she was coming on my right hand and she was coming out towards me.

Q. Do you know the rule with regard to coming in and out of harbor in the Canal Zone?

A. Yes.

Q. What is that Rule. I don't mean the number. What is the substance of the Rule?

A. Always pass left to left.

Q. Isn't there is rule which says upon which side of the channel you must go? Isn't there such a rule as that?

A. On the side which side of the channel you must travel? Coming in you go on the right side of the channel.

Q. And going out you stay on the right side?

A. Yes.

Q. And was the Real on its right hand side of the channel when you first seen it?

A. I couldn't tell her distance inside the channel. I was 60 feet outside of the channel. She was coming giving me her green and her white light.

Q. Was she in the channel?

A. Yes.

Q. How do you know that?

A. She showed her green light and I was 60 feet outside the channel.

Q. Couldn't she have shown her green light and be outside the channel?

A. I don't know. I would have seen both
149 her port and starboard lights if she was outside the channel.

Q. If she was 10 feet outside and you were 60 feet outside, would you see both lights?

A. Sure.

Q. If she was 10 feet outside and you were 60 feet outside, you say you would see both lights?

A. Sure.

Q. Then if she was 10 feet outside and you were 60 feet outside you would see both lights, then?

A. No.

Q. Do you know at what point these lights close out?

A. I forget that; I forget how many degrees it is supposed to be.

Q. If the Real was 20 feet outside the channel and you were 60 feet outside the channel, would you see both the red and green lights?

A. You said if she was 10 feet outside the channel and I was 60 feet outside the channel would I see both the port and starboard lights at the distance she was, from me, but not being so I discerned the green light and the head light.

Q. And you kept your course from the range that you have showed the Judge there?

A. Yes.

Q. You have not told us yet when you were going back in the channel after you got by the Real. Where would you have been if there hadn't been any collision? Where would you have passed the Real?

A. If there hadn't been any collision?

Q. Yes; if there hadn't been any collision where would you have passed the Real?

A. I don't get you on that question.

Q. If there hadn't been any collision where would you have passed the Real?

A. At the same point.

Q. Were you going to turn in there?

A. Yes; because I seen no other boats coming up.

Q. Do you remember the tide at that time?

A. It was coming in.

Q. How much coming in? When was it low water?

A. When was it low water?

Q. Yes.

A. At that time?

Q. Yes.

A. I don't remember.

150 Q. You don't navigate your boat according to the tide?

A. There was about three-quarters tide at the time of the collision.

Q. How long does it take for a tide to make?

A. Six hours.

Q. It was about three-quarters of the 6 you want the Court to understand?

A. Yes, sir.

Q. You are sure about that?

A. Yes.

Q. Do you know the difference between spring and neap tides?

A. No.

Q. Do you know that some days we have a higher tide and some days lower?

A. I noticed that, but I don't know the difference in the time.

Q. On this particular day—morning of the 31st of July was it one of those days of big tides, or a day of small tides?

A. I don't remember.

Q. You don't remember?

A. No.

Q. What time did you leave Chaine or that Island over there?

A. At 6 o'clock that evening.

Q. And what was the tide then at Chaine?

A. Where we were taking the sand it is not—you cannot tell the difference of the tide there; it is on the water.

Q. You cannot tell the difference because it is on the water?

A. Sure: that bank is under the level of the water.

Q. But when the tide comes in it is deeper water and when the tide goes out there is not so much water. Isn't that so?

A. I was working and couldn't measure the tide at the present time.

Q. You said you had a man on the lookout and a man steering and yourself. Is that the way it was?

A. A man steering on the barge.

Q. Steering the barge, too?

A. The barge has a rudder.

Q. You really had 2 rudders?

A. Yes.

Q. That made the barge turn quicker if
151 you wanted to turn you could turn quicker?

A. If she had any speed on she would answer quick, but if she had no speed she would not. It is a barge and it is loaded, and if it had no headway on it it wouldn't steer.

Q. But if you have headway?

A. She would go ahead and turn around.

Q. It helps to make it come around quicker, doesn't it?

A. Sure.

Q. Who was Captain there before you went there on that boat?

Mr. Carrington:

I object to that. It is immaterial.

The Court:

Sustained.

Q. You say you had been captain of the boat for 3 months?

A. Yes.

Q. All of the time you were on her you were captain of the boat?

A. Two months I was Captain by myself; that is, there was another fellow there captain with me, before, and I was working as engineer, and he left and I took charge then.

Q. He left and you took charge?

A. Yes.

Q. You know Captain Peralta, do you?

A. Yes.

Q. If your whistle had been working so as to have the air on it, would you have blown the whistle?

A. No.

Q. Would you have blown a whistle to the Chagres?

A. Oh, yes; to the Chagres, yes.

Q. Why?

A. In answer to her call.

Q. In answer to her call?

A. Yes.

Q. And why would you initiate a whistle then? Why wouldn't you blow to someone else?

A. Why wouldn't I blow to someone

152 else?

Q. Why not blow to the other one?

A. Because I was outside the channel; I didn't have time to blow for her, sir.

Q. Outside you don't have to blow a whistle?

A. Sure.

Q. What were you steering by? You said you didn't have to steer by compass.

A. By the lights of the Canal.

Q. By the range lights?

A. Yes.

Q. Keeping the lights in line?

A. Not in line to the shore; one would be on the left hand side of the high one.

Q. The short one would be on the left hand side?

A. On the right—the lower ones would be on the right hand side of the light.

Q. Are there any other lights up in front of you?

A. Buoy lights.

Q. Any other lights at all up in Balboa Harbor?

A. Plenty of other lights; dock lights, and crib lights, and all such lights around there.

Q. After the collision did the Real assist you to bring the boat into shallow water?

A. I asked the Captain to do so, and he threw his line over, but there was no time to do anything.

Q. How long had you been pushing it toward shoal water?

A. Not three seconds after she struck.

Q. And she went down. Have you seen her since?

A. I was tied up outside.

Q. What? Have you seen her since then?

A. Sure; I went out there and the next day we went out and took off the pumps.

Q. How much of her is out of the water?

A. When the tide is low, you can stand on her deck and the water will catch you by your waist.

Q. The depth of water where she sunk at mean tide is the depth of the vessel from its deck down to its keel. Is that right?

A. About 3 feet deeper.

153 Q. The water is 3 feet deeper?

A. Yes.

Q. You say the decks are out of the water?

A. I said you can stand on her deck and the water would catch me about my waist.

Q. The water there is the depth of the barge, plus 3 feet. Is that it?

A. Yes; at mean tide.

Q. At mean tide?

A. Yes; that's what I said.

Q. You have stated that you first went in the channel because of the shoal water outside the channel when you first came over there, didn't you?

(No answer.)

The Court then, at 12:15 P. M., adjourned until 2:00 P. M.

July 24, 1931.

The Court reconvened at 2:00 P. M., with Capt Fenuel Smith on the stand.

Cross Examination (Continued).

(Questions by Mr. Van Siclen):

Q. When did you say you took charge of the Lucky Girl?

A. I don't remember the date now, but it was 3 months before the accident happened. I worked there 3 months and took charge within 2 months.

Q. When did the accident happen?

A. The 31st of July, 1930.

Q. And you took charge of the Lucky Girl on May 31st. Is that it?

A. Somewhere around there.

Q. Of course, you know you are under oath?

A. Yes.

Q. You testified that you saw the Captain of the Real come from the after part of the boat at the time of the collision, did you?

A. Yes.

Q. Do you know the Real?

A. Yes.

Q. Where is her pilot house?

A. At the stern.

Q. Away on the stern?

A. Yes.

Q. And where does the Captain usually
154 stay?

A. He is supposed to be in the pilot house.

Q. So that to get forward he would have to come from the stern?

A. Yes.

Q. Was there anything wrong about that?

A. No.

Q. You said no?

A. No.

Q. There wasn't anything wrong about coming from aft?

A. He is supposed to come from his pilot house to see what happened.

Q. He would have to come from the stern?

A. Yes.

Q. Are the engines of the Real aft or forward?

A. All aft.

Q. You said you had a man at the pump. What pump?

A. I said arranging the sand pump—the pump for pumping the sand.

Q. You said that you were there and you had a man steering, and there was a man forward and a man at the pump?

A. Yes; the sand pump.

Q. What was he doing at the pump?

A. Fixing it.

Q. Fixing the pump?

A. Yes.

Q. Was the pump broken down?

A. He had to connect it; different suction.

Q. What suction was he putting it on at this time?

A. To dump.

Q. How much sand did you have aboard?

A. I couldn't tell that it was a full load.

Q. Don't you know the measurement of the barge?

A. No; I have no idea.

Q. Do you know what the pitch of a propeller is?

A. Do I know what the pitch of a propeller is?

Q. Do you know what a propeller is?

A. Yes.

Q. Is that what steers the boat?

155 A. No; it is what sends it ahead.

Q. Do you know what the pitch of a wheel is of a propeller?

A. No.

Q. And then these 2 lights you had on davits: On of those was 5 feet up above the deck?

A. On the davit?

Q. Didn't you say you had a light on a davit?

A. No.

Q. You didn't say you had one on a davit?

A. No, sir; I had one light on the davit.

Q. You said—you remember that you testifie about there being an obstruction in the Canal, didn' you?

A. Yes.

Q. How many obstructions were there?

A. The dredge.

Q. The dredge was one?

A. Yes.

Q. Was there any other?

A. The towboat going out.

Q. Any more besides that?

A. Only I was coming in.

Q. Do you know whether there was anything an chored over on this side of the Canal—the side yo went out on?

A. I never noticed it.

Q. There might have been, but you didn't notic it?

A. No.

Q. I see. After the Chagres passed you why di you not come back in the channel and get over o your own side of the channel, like the rules say?

A. Not knowing the speed of the coming boa would not take a chance to go across.

Q. You could tell the distance off he was?

A. Yes; but I wouldn't take no chance—safet first.

Q. He was 7 minutes away?

A. I didn't know the speed of the boa coming.

Q. You knew the distance?

A. That wouldn't help.

Q. You stayed on this side, in violation of the Rules, solely because you didn't know the speed of the other boat?

Mr. Carrington:
I object to this question—it states that he stayed on this side in violation of the Rules.

The Court:
Sustained.

Mr. Van Siclen:
If I remember correctly, may it please the Court, the witness testified that he did violate that Rule.

The Court:
Whether he violated a Rule or not is a question of law and any statement of the question is subject to appeal.

Mr. Van Siclen:
Exception.

Mr. Carrington:
As a matter of fact, he did not so testify.

The Court:
We will assume that he did.

Q. You knew before he blew his own whistle—this boat coming here—that you could arrange to get back on your own side?

A. If I blew one whistle I wouldn't have the speed time to get over on the right side.

Q. If you blew him one whistle if your whistle was working—couldn't you have gotten over on the other side?

A. No.

Q. Wasn't it because you were unable to blow a whistle that you didn't attempt to get back on the other side?

A. No.

Q. You just stayed on that side?

A. Sure.

Q. Do you have a chauffeur's license?

A. No.

Q. Did you ever drive an automobile?

A. No.

Mr. Carrington:

I object to that as immaterial.

The Court:

Sustained.

Q. How high was that forward light on the barge above the deck?

A. 3 feet.

Q. 3 feet?

157 A. Yes, sir.

Q. Did you find out during the noon hour what the course was up the channel?

A. No.

Q. You have not been told the direction?

A. No; I have had no talk with anybody.

Q. How high was your pilot house above the deck of the barge?

A. Above the deck of the barge?

Q. Yes.

A. 5 feet.

Q. 5 feet?

A. Yes.

Q. And you say this light was 3 feet high?

A. On the boat or the barge?

Q. The barge.

A. We don't have any pilot house on the barge.

Q. You have stated that your pilot house is 5 feet above the deck of the barge.

A. The Lucky Girl; yes.

Q. And that you had a light on the barge that was 3 feet above the deck?

A. Yes; the front light.

Q. The front light?

A. Yes.

Q. And how high was the after light?

A. Two feet.

Q. Two feet?

A. Yes.

Q. Your pilot house was 5 feet above the barge and you were looking across to starboard you had to look right in the rays of this light, did you not?

A. I looked by.

Q. You looked by? You would have to look right in the rays of this light?

A. It can be easily discerned from the pilot house.

Q. What?

A. It is easy to be seen from the pilot house.

Q. I know. But in looking anywhere you
158 had to look right at the light.

A. No; it is screened in.

Q. You had it screened?

A. Yes; we had it in front of the barge, below the deck of the other barge the coaming of the barge is high; it is about 4 feet from the deck; and we set it about 3 feet above that coaming of the barge.

Q. I see. So it couldn't be seen from another vessel coming?

A. Not from astern; from ahead; from the side you could see it until you got about even.

Q. It didn't show all around the horizon?

A. No.

Q. Don't the rules say it has to show all around?

A. I don't know.

Q. You testified you were acquainted with the Rules. Then the only light which could be seen all around was this light hanging 9 or 10 feet up in the air. Is that so?

A. Yes.

Q. And that was how far above the deck of the barge?

A. 5 feet.

Q. 5 feet. And was that screened?

A. That is not screened.

Q. But the other one you had over the coaming was?

A. Yes.

Q. Did you or did you not say that the barge sunk within three seconds after the collision?

A. Three seconds after she struck.

Q. After she struck. (Holding watch in one hand and pencil in another.) When I move this pencil down quick, tell me when 3 seconds is up.

A. (After Counsel moved pencil downward.) It is 3 seconds.

Q. That is the time from the time of the collision till she sunk?

A. Yes.

Q. The Real tried to get a line onto the boat, did it?

A. Yes.

Q. And did get it on?

A. Yes; but it was no use; it was not made fast.

Q. He had to maneuver around to get in
159 position, did he?

A. No.

Q. What did he do?

A. After she struck he swung right around.

Q. And then what? Where did he put the line?

A. They threw the line to the barge, and the fellow grabbed it but he didn't do anything to it.

Q. How did you get the barge free of the tug, so the tug wouldn't sink with the barge?

A. Turned loose the front line and she was all loose—slack.

Q. You had only one line?

A. No; three; one spring, a stern line, and a head line.

Q. You had her well fast; and you let go all those lines?

A. No; the front line; after you turn that loose she backed up and was free.

Q. How did she get free of the other lines?

A. The water was not deep so she couldn't float alongside of them and as soon as you turn loose your head spring there must be slack in the back spring.

Q. Immediately after the collision did you go and look and see where she was hit?

A. It was under water and it was impossible for me to see.

Q. Do you know the set of the tide? Do you know what the set of the tide was?

A. No.

Q. How does the current run in Balboa Harbor? Do you know?

A. In and out.

Q. Northerly, southerly, westerly, or easterly? You don't know?

A. I don't know.

Q. Do you know what that color is, Captain (Holding up a green leaf)?

Mr. Carrington:

I object to that as immaterial. Why not bring the whole flags in?

The Court:

Overruled.

Q. Do you know the color of that?

A. That is green.

Q. Did you see the Real before you got by the Dredge Cruces?

A. Before I got by it?

Q. Yes; before you passed the Cruces.

A. No; I saw her just as the 3 of us met together. She was abeam. I looked down the channel
160 to come across and I saw her was coming and I continued my same course.

Q. Did you see the Real?

A. I saw a light coming up.

Q. Before you got to the Cruces?

A. Yes.

Q. When you first seen the Real how was the Real when you first looked at her—when you first come in the channel—when you first saw the Real?

A. (Indicating on chart.) I was here (indicating) and the Chagres here (indicating) and I was on the opposite side and just as they got abeam of each other there was a light coming down the channel and I was outside the channel.

Q. You were outside?

A. Yes.

Q. You say you were outside?

A. Yes.

Q. And you didn't attempt to go back over to your own side of the channel?

A. No; seeing the light coming down I wouldn't take a chance.

Q. When you first came in the channel at the point marked "A" on Libelant's Exhibit No. 1, then which side of the channel did you go on?

A. I entered the channel; I was in the middle of the channel then.

Q. You went down the middle of the channel?

A. Yes; and as soon as I saw the Towboat coming and gave me the two blasts I went over on the other side.

Q. How many feet did you have to go from the middle of the channel over to the other side?

A. I was, naturally, about 20 feet inside of the channel—from the edge of it.

Q. You were going down 20 feet inside?

A. Just entered and come up and saw the light.

Q. And went outside?

A. Yes.

Q. You were pretty near the center?

A. Yes.

Q. You were 20 feet in, and another 20 feet would have been the center, would it?

A. Yes.

Q. You would have to go over on that side (indicating) pretty near 80 feet to get on the other side?

A. Yes; to pass the towboat.

161 Q. When you got 80 feet on that side you would be on the other side of the channel, would you?

A. Yes, sir.

Q. The channel is about 100 feet wide, is it?

A. I don't know the width of the channel.

Q. If you went into the channel 20 feet and was pretty near to the center line, then there would be a little more than 20 feet on the other side, to the other side of the channel, would there not?

A. I don't get that. If I am inside the channel 20 feet—

Q. (Indicating on paper.) This No. 5 Buoy (indicating) and this is the center (indicating). What would be the Buoy on this side? (Indicating.) This is No. 5 (indicating). What would this one be? (Indicating.)

A. Either 4 or 6.

Q. Call it 6. You came in by Buoy 5 and went 20 feet in here (indicating)?

A. Yes.

Q. And you started on down. Now, what were you going to do if there hadn't been any ship there? Were you intending to go in the middle of the channel?

A. Yes; as near as I could or the Dredge.

Q. And that would be about 20 feet more over that you would have to go to get into the middle of the channel?

A. I couldn't directly say.

Q. You know you were 60 feet outside the channel. You know all about that?

A. Yes.

Q. But you don't know whether you were 20 or 60 feet inside the channel—is the water a different color?

A. I judged my distance outside.

Q. Can't you judge your distance inside?

A. If I was inside I would be able to.

Q. Now we are talking about when you were inside 20 feet.

A. After you run a distance you would be able to tell how far you went.

Re-Direct Examination.

(Questions by Mr. Carrington):

Q. Referring to Rule 55 of the Navigation Rules of The Panama Canal, which is already read into the record, and which reads: (Counsel read Rule 55 appearing on page 19 of this record.) Did you have any special reason for not going over on the opposite side of the Canal?

A. Yes, sir.

162 Q. What was your reason?

A. The Dredge on the other side of the Canal.

Q. Did you have any other reason for coming back to the left of the Canal?

A. By orders from the Captain of the Towboat.

Q. What orders did he give you?
A. Two short blasts of the whistle.
Q. You knew those two short blasts notified you to keep to the left?
A. To the left.
Q. I also call your attention to Rule 59 and ask you to read same.

(Witness read as follows from Rules and Regulations Governing Navigation of The Panama Canal and Adjacent Waters:)

Rule 59: Vessels Passing Canal Equipment at Work: Panama Canal floating equipment at work in a stationary position in the Canal prism shall have the prior right to such position; and it shall be unlawful for a passing vessel to foul such equipment, or its moorings, in any way whatever.

Q. I will ask you to state to the Court whether or not you were observing that rule at the time when you saw the dredge? Also read Regulation 59.1 contained in said Rules:

Witness then read the following:

Regulation 59.1. Self-propelled Canal craft, such as tugs and launches, shall, whenever practicable, keep to the side of the Canal and out of mid-channel when large vessels are passing, but nothing in this Regulation shall be construed to warrant a violation of the Rules of the Road.

Q. Was the Dredge "Cruces" at work?
A. Yes.
Q. Was she stationary?
A. Yes; stationary.
Q. And she was located on the starboard side of the Canal coming in?
A. Yes.

Q. At the time when the barge sank, did the bow of the barge go down first? did it sink right away, in other words?

A. Yes.

Q. And that left the stern up in the air holding onto your bow? Is that what you meant? Had you slack?

A. Yes.

Q. When the barge was finally released and she went down, did the water cover her entirely?

A. Yes; entirely.

Q. What did you do to intimate to craft
163 navigating the water that there was some obstruction there?

A. The davit was still out of the water.

Q. It was above the water?

A. It sticks above the water.

Q. Was there a light on it?

A. I placed a red light on it.

Q. You changed the white light to a red light?

A. I put on a red light.

Re-Cross Examination.

(Questions by Mr. Van Siclen):

Q. Suppose that dredge was on the other side of the Canal, then what would you have done?

A. That makes it more convenient to me to get over to my right side.

Q. Which side would you pass it on then?

A. On my port side.

Q. You would pass it on your port side, exactly. Does the dredge have any special lights to tell you when you can go by?

A. A red light.

Q. What does it signify?

A. That it is impossible to pass on that side—blocked on that side.

Q. What?

A. Danger on that side.

Q. What kind of danger?
A. Danger.
Q. Of what would the danger consist?
A. The pipeline sticking out there.
Q. It only has a red light when the pipeline is sticking out?
A. Yes; where the pipeline is.
Q. Does it have a red light on the side where the pipeline is not?
A. No, sir.
Q. You have seen these dredges working there lots of times?
A. Sure.
Q. You know the way they work?
A. Yes; they use cables.
Q. You are not confused about what you are saying now?
A. No.

(Witness excused.)

164 Mr. Van Siclen:
The witness who has just left the stand I expect to call back and Dr. Carrington informs me that it is necessary that he leave here at 4 o'clock.

Mr. Carrington:
The boat on which the witness works is coming through the Canal right now—supposed to leave Cristobal at 12 o'clock.

The Court:
The instructions to this witness are that he is to report here tomorrow morning, if he is here. When do you want him?

Mr. Van Siclen:
Not until I begin to put on my testimony.

The Court (Addressing witness):
Do you understand that you are excused with the understanding that if your ship is here tomorrow on this side, you will appear again in Court at 10:00 o'clock tomorrow morning?

The Witness:
I do.

MARCEL MARTIN was called as a witness, on behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. Carrington):
Q. State your name?
A. Marcel Martin.
Q. Are you an American citizen?
A. I am a Panamanian citizen.
Q. You operate as a Master Mariner for The Panama Canal?
A. Yes, sir.
Q. In what capacity?
A. Towboat Master.
Q. Were you on duty on July 31st of last year?
A. Yes; on the 11 to 7 shift.
Q. Where were you on or about 2:00 o'clock that morning?
A. I was on the Dredge Cascadas; it was digging alongside Dock 6. At 2:30 I proceeded outside with a car tied up on my starboard side and about a half mile before I reached the Dredge Las Cruces I sighted the Lucky Girl with a barge on starboard side. She was about in the center of the Canal at the time and about 4 or 5 minutes after I saw her she took a sheer on the port side—on the left side of the Canal, coming down. So I gave him 2 short whistles, making him

understand that I knew what he was doing. I went on the port side myself and we met about abreast the Las Cruces.

Q. You met abreast?

165 A. Yes; the "Chagres" about the center and the Lucky Girl on the right hand side. She was outside the Canal 50 or 60 or 70 feet.

Q. Outside of the Canal?

A. Yes.

Q. When you first sighted the Lucky Girl did she have regulation lights all burning?

A. Yes; she had a green and red light and 2 lights on the mast.

Q. And when you got abreast she was outside the channel?

A. She was outside the Canal; yes.

Q. (Showing Libelant's Exhibit No. 1 to witness.) Looking at Libelant's Exhibit No. 1, please state to the Court the position of the Las Cruces, and the Real.

A. I was on the left hand side of the Canal near here (indicating) about 60 feet I would say. What word is this (indicating)?

Q. Buoys 7-9. 9 is here (indicating). Now where were you in relation to the channel? About the middle of the channel?

A. I was about—we always keep on the starboard side of the Canal.

Q. The starboard side of the center of the Canal?

A. Yes; the scow was on the starboard side.

Q. What was the width of the scow?

A. That is a 1000-cu. yd. scow.

Q. What is the width of it?

A. About 60 feet.

Q. And the width of your Boat?

A. About 26 feet.

Q. And, of course, what was the width of the channel?

A. 500 feet.

Q. Therefore, you had taken up pretty near 100 feet from the center line of the channel on your starboard side, going out?

A. About 80 feet.

Q. Did this Lucky Girl give you plenty of room?

A. Yes, she was outside the Canal.

Q. When you first sighted her, will you please indicate here on the Chart where she was?

A. She was about here in the center of the Canal coming down. I was here (indicating letter "B" on the chart).

Q. How long have you been a Master Mariner?

166 A. I have been a Master Mariner 24 years.

Q. You have a sea-going license?

A. Yes, sir.

Q. And how long have you been operating in the channel of the Panama Canal?

A. 24 years.

Q. You are quite familiar with the operation of these small craft and towboats in the Canal prism, are you not?

A. Yes.

Q. From your experience, would you say that the Lucky Girl was pursuing a safe course when she took the course you have just indicated?

A. Yes; she did.

Q. Would it have been a safe course for the Lucky Girl to have passed between you and the Dredge?

A. No; she had better pass outside or stop because she did not—according to the Rules of the Panama Canal the one who—has on its side is supposed to stop.

Q. Or pass on the opposite side?

A. The book don't say so.

Q. Do the Rules of the Canal say that?

A. I do not know; I cannot state that.

Q. You didn't see the "Real" coming up behind?
A. No, sir.
Q. Did she pass you later on?
A. Coming back from the sea a boat passed me outside the Canal but I can't tell whether it was the Real or not.
Q. Was it a boat resembling the Real?
A. It was a short boat; but it was too dark to see what it was.
Q. Did she have lights on her?
A. She has a light; she had a dim light.
Q. What time was this?
A. About 12:00 o'clock.
Q. Could the lights of the barge be seen across the Lucky Girl on the starboard side?
A. Yes; the 2; the forward one on the
167 mast—I was looking for the mast. I was looking for one on the mast.
Q. About what distance did you first see the light of the barge and the Lucky Girl? How far away from her were you?
A. I was about a mile from her.
Q. So the lights of the Lucky Girl were visible at least one mile?
A. Yes.

Cross Examination.

(Questions by Mr. Van Siclen):
Q. You have a Master's license, have you?
A. Yes.
Q. For the Canal?
A. For the Canal; yes.
Q. And you also have a French license?
A. Yes; I have.
Q. You have a navigator's license?
A. Yes.

Q. Consequently, you are familiar with the Rules of the Road?

A. Yes, sir.

Q. And particularly the International Rules?

A. The International Rules; yes.

Q. You are acquainted with the Rules of the Canal, of course?

A. Yes.

Q. Do the Rules of the Canal, promulgated by the President of the United States and ordered for the Panama Canal, differ from the International Rules?

A. Very slightly.

Q. What is the rule in the Canal with regard to vessels—the lights to be carried by vessels being towed alongside?

A. Being towed?

Q. Alongside.

A. That is dependent on the barge. She is to have 2 lights, one ahead and one on the stern about 3 feet above the deck.

Q. That is what a barge being towed alongside should have?

A. Yes.

Q. And does the Rule prohibit any other lights?

A. It don't say here.

Q. You don't know?

168 A. The ship towing is supposed to carry a red and green light.

Q. The barge alongside, what lights does she have?

A. On the Panama Canal she only has to have 2 lights, one on the stern, and one ahead, about 3 feet above the deck.

Q. What lights is the towing vessel required to carry?

A. He had his green and red light and he gets 2 white lights on the forward mast about 3 feet apart, one above the other.

Q. Were these shown?

A. Yes, indicating that he was towing alongside.

Q. You are positive of that; you have not made any mistake?

A. Dependent on how he is towing. Depending on the hawser. If she is towing on the hawser she is supposed to have another search light on.

Q. You have testified that when you saw this vessel she had these two lights at this time?

A. Yes.

Q. You are sure you saw them?

A. Yes; I saw the 2 lights.

Q. And if somebody was to say she had 3 lights?

A. I didn't see three lights.

Q. If there were 3 you would have seen them?

A. Yes.

Q. You know it was only two?

A. Yes.

Q. You say you were about 80 feet inside the channel?

A. About the center of the channel; yes.

Q. And you saw the Lucky Girl in the center, too?

A. Yes.

Q. And so you blew the Lucky Girl two whistles?

A. No; coming on the port side, she was.

Q. On the left side?

A. Yes. When she saw me, I guess. I couldn't tell. I think she was on the left hand side.

The Court:

When you saw her she would not—

A. I saw her about 5 minutes after. I saw her coming on the left-hand side; then I blew two whistles to let her pass on my port side—my starboard side I mean, if she kept on coming—she was ahead from the dredge—she was right ahead of the dredge.

Q. What lights did the Lucky Girl show
169 to you when you first saw her?

A. The green and the red.

Q. And when you blew 2 whistles what lights did you see?

A. I only seen the green one.

Q. You initiated the starboard to starboard passage. Is that so?

A. Yes.

Q. And you blew 2 whistles?

A. Yes.

Q. Did you receive any answer?

A. No.

Q. What did you do?

A. I kept on my course.

Q. Do you know the Rules of the Road?

A. Yes.

Q. Is that what is permissible?

A. Yes; I had to clear the Lucky Girl anyhow; if I keep on going I would be up on the Lucky Girl.

Q. Do you know how those rules have been construed?

A. Yes.

Q. Isn't the construction placed on a whistle signal that when you have a failure to answer you must stop?

A. I saw the Lucky Girl clear of me and I kept on going.

Q. Why didn't you blow one whistle?

A. Because I saw the Lucky Girl on the left hand side.

Q. He was over in your water?

A. I don't understand.

Q. He was over in your water, was he not?

A. He was in the center of the Canal; yes.

Q. Now he is in the center of the Canal?

A. Yes.

Q. Then he could go either side?

A. She is supposed to go on the starboard
170 side the right hand side she can't go against the dredge.

Q. Wasn't you supposed to go on your starboard side?

A. Oh, yes.

Q. You were looking after him—after the other fellow?

A. I wasn't going to get in trouble myself.

Q. You took up 80 feet and the tug took 11 feet, making 91 feet in all. How much did the dredge take up?

A. She was about 50 feet wide.

Q. She takes another 60 feet, parallel with the Canal; then we have 150 feet of the Canal used up. Would the other 350 feet be room enough for the Lucky Girl to go through?

A. The dredge was swinging around—

Mr. Carrington:

I object to Counsel arguing with the witness.

Q. It does not swing around when you are passing, does it?

A. No; it does not.

Q. There was still 550 feet of water on the starboard side coming in. Do you know the course in and out the channel?

A. About 321 44 minutes and 36 seconds.

Q. What is the course going out?

A. About southeast-northwest.

Q. Is that magnetic or true?

A. Magnetic.

Q. The channel runs north and south?

A. Yes.

Q. And he had 350 feet, approximately, on the east side of you?

A. Yes.

Q. That could have been used by the Real, if she wanted to?

A. Yes.

Q. How far off did you pass the buoy—this buoy here (indicating on Chart—Libelant's Exhibit No. 1)?

A. About 70 feet from here (indicating).

Q. About 70 feet. Inside the channel?

171 A. Yes; from the scow.

Q. How far off did you pass the Lucky Girl?

A. She was about 60 or 70 feet outside the channel.

Q. You passed about 140 feet apart?

A. Yes.

Q. You had a lot of room. You didn't see anything at all after the boat got by you?

A. No; I didn't see the accident.

Q. Do you know what the rule is relative to going in and out the channel? Do you know the narrow channel rules?

A. Yes.

Q. What is the rule for vessels proceeding in and out narrow channels?

A. She is supposed to keep to her own starboard side of the Canal.

Q. What is the Canal rules with regard to vessels meeting in an oblique situation?

A. Supposed to blow the whistle.

Q. Under the situation as you saw it when you blew to the Lucky Girl, which vessel had the right of way?

A. I had the right of way.

Q. Why? You had the right of way.

A. I don't get you.

Q. You had the right of way?

A. I was on the starboard side of the Canal?

Q. Then there is a rule requiring a vessel to stay on a certain side—

A. The one on the starboard should slow down.

Q. Is it the rule that the one that has the other on the starboard side should keep out of the way?

A. Yes.

Q. That is the rule?
A. Yes.
Q. Are you interested in that same company?
A. Not at all.

172 Q. Speaking of that 350 feet of clear water that you have testified to; would it make any difference whether you went close to the dredge in your vessel or the Lucky Girl?

A. Well, the Lucky Girl had a heavy tow. It would have been more difficult for me to handle the scow, so I gave her all the room she wanted. When I saw her on the port side of the Canal, towing, I gave her a chance to pass.

Q. The Lucky Girl couldn't handle it?
A. Yes; but it was a heavy tow.
Q. Had you seen her before?
A. Yes; I pass her many times in the Canal.
Q. He is always having difficulty?
A. No; I would not say that; maybe he has, but I didn't see it.
Q. She goes along all right?
A. Yes.
Q. There wasn't anything to make you think different, was there?
A. No.
Q. Were the lights on the barge as you observed them, higher than the lights on the Lucky Girl, or were the lights on the Lucky Girl higher?
A. The one on the barge on the davit was higher than the one on the Lucky Girl.
Q. That was an unauthorized light?
A. Please?
Q. That was an unauthorized light?
A. I don't know whether it was higher or the same height as the light of the Lucky Girl.
Q. To whom did you talk about the collision?
A. I don't know anything about the collision; that was afterwards.

Q. Did you talk to someone then about it?

A. I have been talking, like they do; nothing particular.

Q. You never discussed it?

A. No.

Q. How far away do you think you saw
173 the lights on the Lucky Girl?

A. She was about a mile away.

Q. Not any further than that?

A. It was night time; you couldn't judge the distance as well as in the daytime.

Q. How far are the lights supposed to be seen, according to the law—according to the rules?

A. They are supposed to be seen 2 miles on a big ship; I don't know about a small boat.

Q. You don't know what the rule is?

A. In the Canal it is one mile.

Q. All three lights are expected to be seen one mile, or just the head light?

A. The green and the red light are supposed to be seen about 2 miles.

Q. About 2 miles?

A. Yes; on a large boat; I don't know about a small boat; on a vessel—a big ship—the white lights are supposed to be seen about five miles away and the green and red lights 2 miles. The Panama Canal Rules say one mile and don't make a specification for white light or green light.

Q. You don't know whether the Lucky Girl came back in the channel, do you?

A. No; I don't know.

Re-Direct Examination.

(Questions by Mr. Carrington):

Q. You stated a while ago that the Lucky Girl had a heavy tow. Is that so?

A. A heavy tow; yes.

Q. How fast were you traveling going out?
A. We were going about 4 miles an hour.
Q. You made 4 miles?
A. About that.
Q. In your experience would you have considered it safe for the Lucky Girl to maneuver with that heavy tow between you and the Las Cruces?
A. I don't think so; she had room to pass—she could have passed between the Tug and the Dredge, but I think it was safer for her to pass outside the Canal.
Q. It would have been unsafe for her to maneuver between you and the dredge, would it not?
A. Yes.

174 Q. Looking here at Exhibit No. 1 (handing chart to witness) please mark where the barge was sunk, which is indicated by the letter "G", and I will ask you to measure the distance from this letter "G", which is the place the barge was sunk, to the place where you passed the Dredge Cruces. Tell us how far away it was.
A. It was here (indicating on Exhibit No. 1). It was about a half mile; about 900 yards.
Q. At the time you got opposite Buoy 8, where the Las Cruces was, the Lucky Girl was about 60 feet outside of the channel?
A. Yes.

Re-Cross Examination.

(Questions by Mr. Van Sicklen):
Q. You had no other reason for passing starboard to starboard other than to be a good fellow?

Mr. Carrington:
I object. It is not proper cross examination.

The Court:
Sustained.

Q. Do you remember what the tide was?

Mr. Carrington:
I object. Not proper cross examination.

The Court:
Sustained.

Mr. Van Siclen:
Exception.

(Witness excused).

LT. A. J. BYRHOLDT, U. S. N., a witness for the Libelant, was called and, after being duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):
Q. Please state your name.
A. A. J. Byrholdt.
Q. What is your official position?
A. Assistant to the Marine Superintendent.
Q. Are you a member of the United States Navy?
A. I am a Lieutenant in the United States Navy.
Q. How long have you been going to sea as a Lieutenant?
A. I was commissioned a Lieutenant in
175 1921.
Q. How long have you been working on the Panama Canal?
A. 21 months.
Q. As Assistant to the Marine Superintendent, is it a part of your duties to inform yourself about the movements of vessels in the harbors of the Canal Zone Cristobal and Balboa?
A. It is.

Q. Is it a part of your duties, also, to inform yourself as to the operation of vessels through the Canal?

A. It is.

Q. Is it also a part of your duties to investigate any accidents or collisions in the Canal?

A. It is. I am a member of the Board of Local Inspectors.

Q. Is it the duty of your Board to issue licenses to operators in the Panama Canal and in the coastwise and adjacent waters?

A. We issue licenses for all operators and licensed officers for the Canal Zone waters only.

Q. Does the law require, that is the rules of your Board, as a prerequisite to the issuance of a license to an operator that the applicant be the possessor of a limited master's certificate, so as to be able to read charts and measure distances on charts, etc.?

A. For towboat masters and pilots, etc., they require a license. For motorboat operators no other license is required except the license issued by the Board, which conducts an examination, and they are not required to be mariners; they are required to have a knowledge of the rules of the road and to be considered conservative and realize that small vessels must keep clear of large vessels; and also the necessary lights, and the ordinary rules of the road for meeting and passing signals, etc.

Q. You are quite familiar with the handling of boats in Balboa Harbor, are you not?

A. Yes.

Q. Have you been around all classes of boats here in Balboa Harbor to see how they operate—tugs, and towboats, etc.?

A. I have made many trips on the towboats, and I would, also, say I have made 100 transits of the Panama Canal, accompanying pilots on their trips, I would say.

176 Q. If it was true that a dredge was operating in the Panama Canal about 2:30 on the morning of July 31, 1930, opposite Buoy 7, and a towboat belonging to The Panama Canal was coming out with a scow attached to its side, and if it was further true that one of the small boats referred to in your examination as a motorboat was coming in with a large tow, meeting this Panama Canal towboat with its tow, and the Chagres and the Dredge were on the opposite side, what would you say would be the safest course for the operator of this small boat to take in meeting this towboat, and also, with the dredge on the opposite side of the Canal?

A. Of course, it would depend on just exactly his position relative to the Tug and also the vessel, in view of the fact that both of them had to—they would have the same rights in the fairway. The smaller vessel, or the vessel which can maneuver with the least trouble, it would be the proper thing for him to exercise caution and keep clear.

Q. Would you consider it a safe movement or maneuver, as they call it, in nautical language, for the small boat, which we will call the Lucky Girl, with a large tow 85 feet long, and about 25 feet wide, would you consider it a safe maneuver for the officer of that boat, traveling at the rate of 1½ miles an hour, with a flood tide, to go in between those boats, to maneuver through them?

A. I would not consider it safe for him to go anywhere where it would be necessary for him to do a great deal of maneuvering. The proper thing for the master of a motor boat or small towboat with a tow is to try to keep in open water as much as possible, and if he gets into a position where it is necessary for him to maneuver between two vessels, I would consider him a very poor operator.

Q. If it be true that the Lucky Girl, the smaller boat, with her tow, on meeting the larger towboat with its tow, and seeing a tug on the opposite side operating

or seeing the dredge on the opposite operating—if the operator of the Lucky Girl went out of the channel, would you say that was a cautious move on his part—went out of the channel on the opposite side to these two obstructions?

A. I would say that he was exercising proper care.

Q. If it be true, further, that this smaller boat, the Lucky Girl, was about 60 feet outside the channel, and he observed another boat showing its green light coming down the channel, not knowing the rate of speed at which the boat was coming, would you consider that he acted cautiously if he stayed where he was until this boat passed him?

177 Mr. Van Siclen:

Mr. Byrholdt is acting as an expert. He has told about making 100 trips through the Canal and riding around the Harbor and being a Member of the Board of Local Inspectors, and being a Naval Officer.

The Court:

What else does he lack?

Mr. Van Siclen:

I would like to know whether he is qualified or not.

Mr. Carrington:

He also said it was his duty to investigate accidents and collisions in the Canal. If that don't make him an expert, what does?

The Court:

No; I don't think that would. I apprehend that a man that has been a Lieutenant in the Navy since 1921—ten years—

Mr. Van Siclen:

May I ask a question in regard to qualification?

The Court:
Yes; you may.

Mr. Van Siclen:
What is your commission as a Lieutenant? First line of duty?

The Witness:
Yes, sir.

Mr. Van Siclen:
You are not limited to engineering duties?

The Witness:
I have nothing to do with engineering duties. I am a line officer in the United States Navy and under assignment to any duties that the Commanding Officer or the Secretary of the Navy sees fit to assign me to. For information, I will state I was executive officer and navigator of the Scorpion in the Eastern Mediterranean for two years, in command of her for one year. I was navigator of a U. S. Navy oil tanker and cruised about 20,000 miles during that time, and I was in command of a fleet tug operating with the United States Fleet in the Pacific for two years, as Captain.

Mr. Van Siclen:
That's what I wanted to know. I wanted the record to be clear.

The Court:
I think it is clear. Proceed.

Q. If it be true that the operator of this smaller boat, which we referred to as the Lucky Girl, with a tow, was 60 feet outside the channel and saw another boat proceeding down the channel, showing its green light, and not knowing the rate of speed which that oncoming boat was making, would you consider it a

safe maneuver for him to have started across the channel to get over on the other side, when he was making only 1½ miles an hour in flood tide?

A. That would depend, of course, upon the distance at which he sighted this light, but as long as he was outside of the channel and proceeding in he would be doing the more cautious thing by staying where he was instead of crossing over and possibly
178 placing himself and his tow in jeopardy by crossing the bow of another vessel.

Q. Is it not true that small boats—speed boats—go through the Canal at all hours of the night, some going fast and some slowly?

A. Yes; all the motorboats belonging to the Port Captain, naturally travel between Pier 19 and the boat landing at all hours of the night, coming in and going out whenever it is necessary, and there are other miscellaneous boats, also.

Q. So that you would say the operator of this boat in staying out of the Canal, as he testified, in order to permit this approaching green light to pass first before he started to maneuver back in the channel, was making a cautious move?

A. I believe so.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. The onus to obey the rules of the road are not any greater on a steamship than they are on a launch, are they?

A. No.

Q. If the obligations are the same on each one, why do you say it would be incautious for a vessel of the type of the Lucky Girl, towing a barge, to attempt to maneuver in a space of 300-odd feet?

A. I made no such a statement.

Q. Would it or would it not be incautious?

A. It would all depend on the circumstances. If it was not necessary for him to run into that space, he would be foolish to do it.

Q. The vessel was coming ahead in this channel (indicating on chart, Libelant's Exhibit No. 1), that is the Chagres (indicating) and here is the Lucky Girl (indicating), and the Master of the Chagres testified (as did also the Master of the Lucky Girl) that the Master of the Chagres blew two whistles. The reason for that was to avoid her passing alongside the Dredge. With the situation as has been stated, the vessels meeting here (indicating) under the rules of the road what were the proper signals to be made?

A. Normally, the Tug would have sounded one blast. The Master of the Towboat is not obligated to sound one blast, for the law allows you to use your judgment, and in view of the fact that the Master sounded 2 blasts, he must have decided that that was the safest maneuver and the Lucky Girl, after the 2 blasts, had no choice, except to force an issue with the larger vessel, which would be
179 a very poor move to make. He could have answered with two and sounded with one and insisted on going on the right side of the channel, but I do not believe that would have been a proper move for a boat the size of the Lucky Girl to make, and in view of the fact that the Tug Chagres had given him two blasts.

Q. Do the rules of the Canal require whistles to be blown by vessels in sight of one another?

A. The rules of the road require that; that is the International rules, the Inland rules, and the Canal rules.

Q. The only rules having any legality are the Canal rules and the International rules, are they?

A. Yes.

Q. Is it not the rule that a vessel having gone for a special purpose to the port side of the channel must return as soon as possible to the starboard side of the channel?

A. Not necessarily.

Q. That is not a rule?

A. If they are outside of the channel they are free to go as they see fit. For example, in the Yacht Club basin the boats run both ways outside the channel.

Q. Would you say a vessel outside the channel didn't have to blow a whistle?

A. I would not state that. The rules state "vessels in sight of one another."

Q. The Canal rule requires a vessel to have a whistle and that whistle to be in good order, does it not?

A. It does.

Q. Does the Canal have a rule similar to the inland rule—the narrow channel rule?

A. I don't know which rule you are referring to.

Q. You know the narrow channel rule, don't you?

A. Yes; it is exercising caution and slowing down.

Q. I mean the rule called the narrow channel rule.

A. I don't know it by that name.

Q. I will hand you a work called Bolateaux (handing book to witness) and ask you to read for the record Article 25 of the International Rules.

A. (Witness read as follows:) In narrow channels every steam vessel shall when it is safe and practicable keep to that side of the fairway or middle channel which lies on the starboard side of such vessel.

Q. The Canal has a similar rule?

180 A. Absolutely; that is an international rule.

Q. You have one in the Canal, also?

A. It is very similar to that.

Q. Would you consider the channel of Balboa Reach a narrow channel?

A. Yes; I would.

Q. And that would be a water in which this rule would apply; this Article 25?

A. It would.

Q. Have you ever heard that rule construed—ever read a construction of that rule?

A. I have; yes.

Q. Would you say, looking at the Chart (Libelant's Exhibit No. 1), you would consider it safe for a vessel drawing 9 feet of water to be outside 60 feet outside of the channel at the point marked as the wreck?

A. I think it would be safe for him to be out 60 feet all right.

Q. Looking at Libelant's Exhibit No. 1, I ask you to measure from the point abreast of the wreck the distance where there would be very shallow water.

A. It would—

Q. It would be towards Balboa?

A. It would be about 180 yards (indicating) before you hit the mud flat.

Q. Until the water would be too shoal for a vessel of 9 feet draft?

A. That's correct.

Q. So that a vessel arriving at the point where the wreck is shown on the chart would necessarily have to get into the channel almost immediately wouldn't she in order not to ground?

A. He would only have a little over 500 feet to go until it would be necessary to get into the channel or ground.

Q. He would have to start to get in; to proceed to get in? He was proceeding all the time?

A. Yes, sir.

Q. The rules and regulations governing the navigation of the Canal require the blowing of whistles in the case of meeting vessels, do they not?

A. They do.

181 Re-Direct Examination.

(Questions by Mr. Carrington):

Q. Does that apply to small boats, also?

A. It applies to all vessels, although times

Q. Is it not a rule, also, of The Panama Canal that a boat that is unburdened must give way to a boat that is burdened?

A. It is a rule that is carried out at sea, but there is no such rule that would compel you to give way. You must always exercise caution so as to prevent collision. Normally, the rules of the road are complied with, which is according to the size of vessels, signals are exchanged and they go on their course in accordance with the rules of the road.

Q. The Proctor for the Respondent read to you the narrow channel rule, No. 25. I will read to you Article 27 of the Inland Rules, called general fundamental rules, that reads thus: (Reading) "In obeying and construing these rules, due regard shall be had to all the dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Is that one of the rules?

A. That is correct. That rule is also in the international rules.

Q. Yes; it is international rule No. 27. In regard to the point shown to you by the Proctor a moment ago as to shallow water, which you say is about 500 feet away from where the barge was sunk, is it not a fact that that water is higher at flood tide than as it appears on the map or chart?

A. The water shown on the map is mean low water.

Q. At flood tide, of course, it is higher?

A. It is.

Q. In other words, construing all of the rules of the road, would you not say that it is the supreme duty of all vessels to act in such a way and with such caution as to avoid collision?

A. That is correct.

Re-Cross Examination.

(Questions by Mr. Van Siclen):

Q. Mr. Carrington has spoken to you of Article 27. That is known as the general prodential rule and is a rule which comes in force only when there is immediate danger of a collision?

182 A. I would not construe the rule that way; it requires the mariner to be prudential at all times, whenever it is necessary to deviate from the rules in order to exercise due caution he must do so.

Mr. Van Siclen:

I suppose you know our Supreme Court decision in regard to that rule—

Mr. Carrington:

I think that is a prerogative of the Court.

The Court:

I am just a little bit jealous about prerogatives. These are matters of law.

Mr. Van Siclen:

Mr. Carrington said he was reading the law to the witness. I asked the Lieutenant a general question not of law.

The Court:

It is not a matter of expert opinion but a matter of law as to how these rules are to be construed? Am I correct?

Mr. Carrington:

Yes; that's correct.

The Court:

Being a matter of law, the witness is not competent to testify as to the legal construction of the rules.

The Court:

I wish counsel would object if my question is out of order. Lieutenant, then, as I understand the situation, all these rules and regulations they have and rules of the road, whether international or Panama Canal or general rules of the road, are subject at all times to the higher rule that caution must be exercised in all cases and under all circumstances where danger may be imminent. Is that correct?

The Witness:

It is, sir.

(Witness excused.)

T. P. O'SHEA was called as a witness on behalf of the Libelant, and being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. What is your name?

A. T. P. O'Shea.

Q. How are you employed?

A. At present I am employed as Marine Engineer for the Marine Division, Panama Canal.

Q. How were you employed on July 31, 1930?

A. Acting Inspector of Hulls and Boilers, Marine, Panama Canal.

Q. On that day do you know, of your own knowledge, whether or not the Motorship Real was licensed to operate in the Panama Canal?

A. Yes; she was not licensed.

Q. She was not licensed?

A. No.

Q. Do your know when her license expired?

A. It expired on the 22nd of July.

Q. And what did you do, if anything at all, to compel the Real to get a license in order to operate in the Panama Canal?

A. The Real's license expired on the 22nd of July. The procedure is to notify the harbor pilots that ships are due for inspection. The owners—the master of the ship is expected to notify the inspection office when this becomes due. Of course, we in the Inspection know when it is due. When they ask for inspection we inspect them.

Q. Did you have to order the Real to cease operating, in order to be inspected?

Mr. Van Siclen:

I object to the question. It is immaterial and irrelevant; whether she had a license or didn't have didn't help make the collision or wouldn't avoid the collision.

Mr. Carrington:

We want to show negligence; that she had no right to be there.

Mr. Van Siclen:

Whether she did or did not have a certificate is immaterial and irrelevant. The issue is there was a collision and not whether she did or did not have a license.

Mr. Carrington:

We have also set out certain grounds which we think have yet to be ruled on. In order to operate in the Canal you must obtain a license; your boat must be inspected to see whether it is in proper condition or not; and if it is not inspected at the required time the boat is not in proper condition.

The Court:

I think that is material to the point as to whether she had a right to be at the point where she was at the time. It may not have anything particular to do with the case. The objection is overruled.

Mr. Van Siclen:

Exception.

184 Q. What did you do in order to get the boat to come in to be inspected?

A. Personally? The Captain of the Port held the ship up until she was inspected, and then I was called on to inspect the ship. I inspected her and issued the necessary certificate.

Q. What day was that?

A. That was on the 4th of August, as near as I can remember.

Q. That was after the collision?

A. After the collision.

Q. Do you know if she went to sea then?

A. After that?

Q. Yes.

A. Yes; I think she went to sea almost immediately after that, because Mr. Elliot came to the Inspection Office to get the certificate. I know she was held up.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. Her certificate had expired. Is that correct?

A. Yes; her certificate had expired.

Q. She had a certificate?

A. Yes; but it had expired.

Q. And the time for renewal had passed by?

A. Yes.

Q. When you did make your inspection did you find anything wrong with her?

A. No; nothing wrong with the vessel. Of course she had a little—her forefoot was damaged where she struck the scow; there may have been some more things wrong with it, but I don't think—there was nothing of vital importance; no.

(Witness excused.)

THOMAS R. LOMBARD was recalled as a witness for the Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. What damage would you say was done to the barge by the Real?

A. She was struck on the starboard forward quarter, just a little bit ahead of amidships, and a hole was driven in there. You can't get down to
185 the hole. I dived down and measured it with my arm as well as I could. It appeared to be about 2 feet wide at the top and 2 feet deep, and she had gone clear through the deck in a triangle, coming to the apex of that triangle at the coaming. Otherwise, that hole of 2' x 2' triangle formed another 2' x 2" triangle on the deck.

Q. Have you been buying and selling barges?

A. In the course of my life I have bought several; yes.

Q. How much did this boat cost you?

A. This boat cost me $2,000.

Q. When did you buy the boat?

A. That was in December.

Q. What year?

A. 1929, I think that was December; it might have been January; but somewhere along about that.

Q. What was the condition of the boat at the time that is what was the condition of her hoppers and her deck as to the work she was doing, if any?

A. The deck and sides of the boat were almost in perfect condition to the bottom. It is a German built barge and the bottom had been made of wood, and hadn't been properly cared for and the worms had gotten into the bottom and there were some minor repairs made to it by the previous owner and she was used for carrying bananas and timber up from Darien.

Q. What improvements did you make on the boat?

A. I put in a reinforced concrete bottom.

Q. How much did it cost you?

A. $1,000.00, about.

Q. Did you try to get an estimate on the work before you did it?

A. .....wanted $2,800 to put the bottom in.

Q. And you did this work yourself?

A. For about $1,000; yes.

Q. What did you do to the sides of the barge, if anything?

A. There was nothing to be done to the sides of the barge at that time; they were in perfect shape; the only thing wrong was the bottom, and I put that concrete bottom in—built a hopper—foundations for pumps and installed my pumps, or, rather, I got the foundations for the pumps ready, and then
186 took the barge over to Balboa and had the pumps installed in Balboa.

Q. How much did the installation of the pumps cost you?

A. I have one bill of 880-odd dollars from the Canal, and probably about $250 more on labor. I went into the proposition, and approximately $1,000 went into her in the building of the foundations, with the machinery and the hopper, the hopper being quite a difficult proposition to get in there successfully.

Q. The machinery and pumps that you put in, who did that work?

A. The pumps were installed by The Panama Canal. I purchased the pumps, the pipings and such stuff as that.

Q. How much did it cost you?

A. The pumps, if I recollect now—this is giving a close estimate, not actual figures, because I would have to get my books to get the exact amount—it is about $1200. I think the pumps cost; F. O. B. factory, Baltimore.

Q. How much?

A. About $1200; F. O. B. factory, Baltimore.

Q. Have you got the exact amount you paid out?

A. Mr. Rowe will be here to testify as to that. He cannot be here this afternoon. He is employed by The Panama Canal and it's a very difficult time to get hold of him.

Q. How much did the barge cost you?

A. The barge cost me $2,000.

Q. With the equipment and the hopper and the work you put on it and the cement you put in

Mr. Van Slyck:

I object. Mr. Leonard has said he couldn't tell to [illegible] but he does have all these [illegible] books. That certainly would be the best evidence.

The Court:

Sustained.

Mr. Carstarphen:

Please state the value of the barge at the time it sank.

Q. What was the value of the barge to you, at the time it sank?

A. The [illegible] I can place on the barge at the time it sank is the price it took to replace it.

Q. What was its value to you at the time it sank?

A. It stood me around $10,000.00.

187 Q. Was that the fair market value of the barge?

A. Well, it was considered at the time that I got a bargain in regard to the hull.

Q. At the time it sank, was $10,000 the fair market value of the barge?

A. I would think so; yes; because it cost more than $18,000 to replace it.

Q. Did you make any effort to salvage the barge?

A. Yes.

Q. What efforts did you make?

A. Mr. Arias and I agreed that some findings would be made on this thing.

Q. What efforts did you make?

A. I went out there and tried to get it up. I went to The Panama Canal and I hired the La Valley to go out and pump out the sand and they had a diver and were supposed to lift it, and when they got out there they decided they couldn't lift it with the La Valley and then I tried to make arrangements with them to lift it with the Ajax. They told me that one hour's work would cost me in the neighborhood of $1000 to get one hour of labor on the job, and then they wouldn't guarantee the barge wouldn't be broken in two when they brought it up. That was a prohibitive rate something like $300 or $400 an hour. The La Valley was going to go out for only two hours and it was there 8½ hours pumping the sand out and lifting out 2 pumps, which had already been unfastened for her.

Q. Did you pay for that service?

A. Yes.

Q. What did it cost?

A. I cannot give you exact figures on the proposition somewhere around $600.

Q. You said you used the barge for transporting sand from Chame to Balboa.

A. Yes, sir.

Q. To whom did you sell the sand, if you did sell it?

A. The sand was sold to different contractors in Panama.

Q. How much a trip did you make on the sand?

A. Gross?

Q. Net.

A. We couldn't figure a trip like that—the sand was selling at that time for $1.50 per yard. The barge was bringing in from 85 to 100 yards of sand.

188 Q. About how much were you making each month on the sand, if any; the sale of the sand?

A. At that time about $1,000 a month.

Q. That was the net profit to you every month?

A. Yes.

Q. How long were you without the use of this barge?

A. I was 3 months without the use of it; approximately 3 months; but that was not the biggest trouble; the biggest trouble was at that time I couldn't supply my contractors in Panama; but now the beaches of Panama have been opened up, which I have not been able to close. It did a great deal of damage to my business, my not being able to give service at that time.

Q. Then the profits you lost before you could procure another barge was, say, $3,000.00?

A. Approximately.

Q. Did you subsequently get another barge and recondition it for the work, after 3 months elapsed?

A. I started reconditioning immediately.

Q. How much did that barge cost you to replace the one that was lost?

A. Getting that into condition it cost me approximately $18,000.00. I have a little bit larger barge.

Q. You salvaged some of the machinery from the sunken barge, did you not?

A. I didn't get that.

(The Reporter then read the previous question.)

A. Yes, sir.

Q. How much did you salvage?

A. The 2 pumps.

Q. What else?

A. They had cost me approximately $4,200 F. O. B. factory in the States.

Q. The 2 pumps and the appliances and their connections cost you about $4200?

A. The 2 pumps; not the connections and stuff like that.

Q. The 2 pumps alone?

189 A. Yes.

Q. And what did you salvage?

A. The 2 pumps.

Q. How much did it cost you to salvage the 2 pumps?

A. A total of $600 odd.

Q. It cost $600 to salvage the 2 pumps?

A. The only thing the La Valley did for me was to go and pump the sand and lift out those 2 pumps.

Q. And you paid $600 to The Panama Canal for that?

A. Yes. That was the reason why I couldn't possibly consider taking the Ajax over there, because the La Valley was going to do that in an hour or two and it took them over a day to do it. If the actual work of the Ajax was in the same proportion to their estimate, it would have cost me $18,000, with no certainty of getting the barge.

Q. Did you have to make any repairs to the pumps?

A. They had to be entirely taken down to be overhauled.

Q. How much did that cost?

A. Approximately between $400 and $500.

Q. Who did the repair work?
A. The Panama Machine Works.
Q. How much did you say?
A. Between $400 and $500.
Q. You have a bill there, haven't you?
A. Yes.

Mr. Carrington:

We had another witness who should have been here, but he has not been able to come, so we have proceeded the best we could until he gets here tomorrow.

The Court:

His evidence, of course, is not evidence at all. It is just an estimate. He says "between $400 and $500" and "I guess $3,000.00". The books are the best evidence.

Cross Examination.

(Questions by Mr. Van Siclen)

Q. Why did not the La Valley lift the barge?
A. I don't know; they said she was old and that they were afraid to make that lift with her; that she might break her, have her decks cave in on her in making that lift.
Q. Did they say they would lift it on your responsibility?
A. They would not put a rope around it with the La Valley. I asked them to make a try at it and they refused to even make a try.
Q. Did they suggest a manner in which they might lift it?
A. I did.
Q. Did they?
A. Yes; with the Vlax.
Q. With the La Valley?
A. No.

Q. Was anything said about using sheet iron where the straps could go around it to strengthen the pieces?

A. Not to me. Mr. Claybourn's statements to me was that (when I pointed out to him that the La Valley had been lifting heavier loads and putting them on the lock wall) he said that was something they had done, but they were not doing that any more; that the La Valley was not in condition to make those lifts.

Q. Did you go to the office of the Dredging Division at Balboa to make arrangements for the La Valley?

A. I did.

Q. Did you have a discussion then as to the ways, etc., that might be used?

A. All that was discussed was as to how she might be used and she went out there with the intention of lifting it, and then Mr. Claybourn came out there and said he would not make the lift. I asked him if he wouldn't even make a try. They brought down that 50-foot strap which wouldn't do anything except to cut a barge of that description in two; they had to have longer straps to make that lift; they didn't have those and they would have to send to Pedro Miguel for those, the next day; that would have brought my charges up to double that, and they refused to make the lift; and they said if we paid the Ajax they wouldn't guarantee they would bring me out a barge, only some pieces up to the top; that is the only guarantee they would make.

Q. The Dredging Division refused to lift it?

A. They refused to make that lift. Captain Martin of the Dredging Division was positive he could make the lift; Mr. Claybourn refused to make the lift.

Q. Did you discuss the matter with Capt.

191 Martin?

A. After the proposition was over, I told Capt. Martin that I thought the old cheese box was getting pretty old. He said "I'll bet anything I have got I can lift her." I said "Convince Claybourn, because he won't lift her.

Q. You told Capt. Martin he was getting pretty old?

A. That the barge was getting pretty old; Martin is a young man.

Q. Then the only alternative was the Crane Ajax?

A. Yes; they offered me a very reduced rate on her, coming to about $1600 the first hour.

Q. Did you try the Salvage Division? The Light House Division?

A. Why; Mr. Elliott agreed to put up the money with me to raise that barge, and that we would abide by the Board's decision, as to whether he was to blame; whoever was to blame was to pay the whole thing, and Mr. Elliott then refused to put up his part of it; so I did the best I could and put up my deposit myself—I think it was $1000—for the Dredging Division to go ahead, and they went ahead with the results of nothing with the exception that they lifted the 2 pumps off.

Q. Did you make any effort to have the salvage vessel, the Favorite, lift it?

A. They told me the Favorite couldn't lift it.

Q. You made an effort?

A. I spoke to them all about it; talked to them about it. None of them would guarantee it—they wouldn't guarantee to get anything up but pieces.

Q. You stated that you paid $2500 for the barge in the first instance; the barge was in pretty bad condition at the time you purchased it?

A. I paid $2,000 for it; not an exact figure. The barge itself, outside of the bottom, was in very good condition—the sides.

Q. I see; it was a ship without a bottom?

A. Yes.

Q. When you purchased it it had a wooden bottom?

A. I guess it still has that. And we used that as a form for reinforced concrete.

Q. Who suggested putting in the concrete bottom?

A. Common sense and my own knowledge.

Q. Did you discuss the question with anyone?

A. Yes; with everybody I knew that
192 knew anything about it. It is common practice, I believe, to do so.

Q. What was the size of the barge?

A. 85 x 17 x 7½, I think.

Q. 85 x 17 x 8½?

A. 8½ was it?

Q. I thought that was what you said.

A. I think it is 7½.

Q. The barge was 85 feet long?

A. Yes.

Q. Who did you purchase it from?

A. I purchased it from Salazar, through Mr. O'Barrio, acting as Salazar's agent. He turned the checks over to Mr. O'Barrio.

Q. It had originally been a barge owned by the—

A. Hamburg American Line and sold to Capt. Svensson for $1 and other valuable considerations, the same as the American—

Q. The market value of the barge in this market was what you paid for it—would that be the market value?

A. I would say the market value at that time would have been even more. In fact, at the time I had the concrete bottom in and before I put the pumps in, I was offered a very good profit on it for towing bananas.

Q. Do you know what such barges are selling for at the present time?

A. I know what I bought a little bit better barge than that for—$5,000.00.

Q. In this market?

A. In this market.

Q. Do you know what they are selling for now?

A. I know 2 barges out there at Balboa, one of them I think I had a figure on—this is only approximate—$4000-odd—up close to $5,000.00—the other just.

slightly over $4,000.00. I have that list of ..... Hamburg American barges, because that is what I bought the present barge of.

Q. Those barges are whole steel barges?

A. The barge that I have now that I paid $5,000 for came from Germany in the same shipment as the barge that I had that was sunk, but it is a little bit larger and when the wood bottom gave out in it they sent it back to Hamburg and had a steel bottom put in it and overhauled it and brought it back.

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Q. That is the one you have now?

A. Yes.

Q. And for that you paid $5,000.00?

A. $5,000.00.

Q. A vessel without a bottom wouldn't be worth very much?

A. The Panama Canal offered to put an all-steel bottom in there for me for a little less than $4,000. I had contractors offer to put a bottom in there for as low as $2,800.00.

The Court:

That is concrete?

A. That is steel; then I had a wooden bottom offered to be put in there for me for $1400.00, but he was so long in getting at it that I finally put the concrete bottom in.

Q. How much did the concrete bottom cost you?

A. About $1,000.00; that is reinforced. All that concrete bottom in a boat of that sort is not just a flat slab; there are braces that run across that bottom that were 9" x 7", with a 3-inch slab on top of that. The whole thing was reinforced into the ribs of the vessel with number 00 wire.

Q. You spoke about a hopper. What do you mean by that?

A. The hopper was in the center; the place where the actual cargo was carried distributed over the

length of the original cargo-carrying hopper or as, by the way it was constructed and carried by the bottom of the boat so as to not throw the entire load into the middle of the ship.

Q. Was that made of wood?

A. Yes.

Q. It was sort of a crib?

A. No; it was water tight—it was supposed to be water tight; it was hard work to get it water tight—so it would stay absolutely water tight.

Q. All the efforts you made to raise that barge was to request The Panama Canal to raise it. Is
194 that the entire effort you made to salvage the barge?

A. No; no; no. I went out there; Mr. Elliott said he would go out with me with the Real and help me salvage the pumps. He came out there with the Real but when he got out there he hadn't fixed his clutch yet, or something, and I realized that if he tried to maneuver the Real up alongside he was going to damage one of my pumps, and if it hadn't been for the man on the Lucky Girl on the stern of her he would have rammed the Lucky Girl that next day, because his clutch, or something, was not working.

Q. I am speaking of salvaging that barge.

A. That is one of the attempts we made together to salvage the barge and salvage the pumps.

Q. And then?

A. When he refused to put up his side of the money, as he had suggested, I went to put up my money with The Panama Canal and tried in every way possible to get somebody to lift the barge out of there at a price that would be some guarantee that I would get a barge after I had spent my money.

Q. And at that time as the vessel laid on the bottom, what did you value her then?

A. As she laid on the bottom?

Q. Yes.

A. Nothing; zero. What good is she when she is not afloat? I have no use for a dock out there.

Q. How much did you contemplate spending to raise her?

Mr. Carrington:

I object. That question is not—

A. Any price that would deliver me a barge.

Q. What do you mean by any price?

A. I mean any price that would be within common business sense of what it was worth, to bring it to the top, but when The Panama Canal gives you a price that may easily run to $3,000 to salvage this barge and you know you are going to spend anywhere from $500 to $600 to repair the damage to her, to say nothing about the possible breaking away of the entire hull from the bottom, due to this heavy blow she received. I didn't know what the barge would be worth, even after she was brought to the top. There is no way of telling whether that barge would float or whether it would cost $1000 or $4,000 to put her in shape after you got her to the top.

195 Q. In other words, you abandoned her rather than spend $2,000.00.

A. It was the only thing I could do; there was nobody that would salvage it for me.

Q. Did you pump the sand overboard?

A. I paid The Panama Canal to pump the sand overboard so they could make the lift; they agreed to make the lift and then afterward didn't make it.

Q. Why didn't you salvage the sand?

A. I didn't want to pay $250 for sand that is worth $125.

(Witness excused.)

1961 United States District Court for the Canal Zone Balboa Division.

Thomas R. Lombard, Libelant,
vs.
The Motor Ship Real, etc. Respondent.

In Admiralty No. 1028.

Hearing (Continued). July 25, 1931.

H. B. ROWE a witness for the Libelant, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.

A. H. B. Rowe.

Q. What is your occupation or profession?

A. Accountant.

Q. How long have you been an accountant?

A. 20 years.

Q. Please state to the Court for whom you have done accountancy or auditing?

A. Here or in the States?

Q. Both.

A. 20 years for the Barley Company, New York, Universal Pictures Corporation, New York, J. G. White Company, New York, and the Panaman Government.

Q. Were you the accountant for Mr. Thomas R. Lombard in the handling of his business in respect to the purchase and reconditioning of a certain barge?

A. Yes, sir.

Q. The barge that you kept the accounts for, was that the barge that was sunk in Balboa Harbor July 31, 1930?

A. It was.

Mr. Van Siclen:
I think the answer and question should both be made more definite. There is a way of describing that barge, and still we have here an uncertain barge that Mr. Rowe is going to testify to.

The Court:
Have it described.

Q. Do you know how many barges Mr. Lombard had on July 31, 1930?

A. He had one.

Q. Was that the one that was sunk?

A. It was.

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Mr. Van Siclen:
I don't think that that describes any barge.

The Court:
Yes; that describes it. This Libelant in this ca had one barge, which was sunk on July 31st. Ob jection overruled.

Mr. Van Siclen:
Exception.

Q. Have you with you the records or memoran showing the cost price of the barge?

A. I have.

Q. Will you please look at it and tell the Co what was the cost price?

A. The cost price of the barge before the impr ments was $2,000.00.

Q. Do you know what improvements were put on the barge?

A. I know the cost of them.

Q. What was the cost of the improvements?

A. $2,590.60. That does not include the value of the pumps which were also put on the barge.

Q. That was $2,590.60?

A. Making a total of $4,596.00.

Q. You say some pumps were installed?

A. Yes.

Q. What does your record show as to the value of those pumps?

A. They cost $5,371.69.

Q. Do your records show the cost of installing those pumps on the barge?

A. The cost of installation is included in the cost of the barge, because it is an improvement in the barge.

Q. You kept a separate account?

A. Yes.

Q. This $2592 includes the installation of the pumps?

A. Yes.

Q. And, as I understand it, the value of the pumps, or the cost of the pumps was $5,371.69. Is that correct?

A. Yes, $5,371.69.

198 Q. At the time when the barge was sunk do your records show the value of the sand that was on the barge?

A. It does.

Q. Will you please tell the Court what sand was on board and its value?

A. .85 cubic yards, valued at $1.50 per cubic yard, which is $127.50.

Q. Was that the market price at which the sand was sold during that period?

A. It was.

Q. Does your record show, also, the cost of a drum of gasoline on board?

A. No, it does not.

Q. Does your record show any moneys paid to The Panama Canal for attempting to salvage the barge?

A. It does.

Mr. Van Siclen:

I believe the records should be put in evidence.

The Court:

They should be marked for identification. I don't know whether he is going to offer them in evidence or not.

Mr. Carrington:

That will be done.

The Court:

Proceed.

Q. How much does it show?

A. $455.48; and there were further salvage cost moneys not paid to The Panama Canal, but paid to others.

Q. This was paid to whom?

A. The Panama Canal.

Q. For what purpose?

A. For the attempt to salvage.

Q. How long did you keep the accounts of Mr. Lombard for the transportation of this sand from Chame?

A. From December, 1929.

Q. From December, 1929?

A. When he first started.

Q. On this particular barge does your record show what profits you made for the 2 or 3 months immediately prior to the 31st of July, 1930?

A. It shows from May 24th.

199 Q. When?

A. May 24th to July 31. The gross income at that time was $4,304.25.

Q. Gross income?

A. Gross income.

Q. Now what was the net income? The gross was what?

A. $4,304.25.

Q. What were the operating expenses?

A. That was $2,269.20. You have a net income of $2,035.05.

Q. That was for the 2 months immediately prior to July 31st?

A. That was for 69 days.

Q. Do you know how long it was before Mr. Lombard got another barge to operate sand?

A. Yes; 83 days; from August 1 to October 22.

Q. Calculating the profits that were made for 2 months immediately prior to the sinking of the barge, what was the ceasing income what do you calculate was the ceasing income?

A. Based on the profits for 69 days, the profit for 83 days at the same rate would have been $2447.96.

Mr. Van Sicklen:

I object to the answer and ask that it be stricken. It is at least speculative.

Mr. Carrington:

It lays a foundation.

Mr. Van Sicklen:

Prior earnings might not show the earnings at that particular time. It is speculative.

The Court:

It is taken for what it is worth.

Q. The ceasing income is one of the elements allowed in damages. What was that?

A. $2447.96. May I introduce a matter?

Q. Yes.

A. There were some other expenses in connection with the salvage attempt. The Tug of Mr. Lombard was used for 2 weeks on that and there were expenses of the Tug and of the lighter, and that amounted to $206.92.

Q. The Tug was used for 2 weeks?

A. Yes.

The Court:

This brings in the other salvage expenses other than those paid to The Panama Canal?

A. Yes.

260 Q. How much was the cost of this Tug and other expenses?

A. $206.92.

Mr. Carrington:

We now offer in evidence Libelant's Exhibit No. 2, which is a statement in detail of the operating expenses and losses of the Libelant in this case, in connection with the barge sunk on July 31, 1930.

Mr. Van Siclen:

I object to its admission. In the first place it does not say to whom this is billed or anything about it—not a name on it whatsoever. Secondly, it is supposedly, judging from the testimony, to have been taken from books, and they certainly must be the best evidence if the books are still in existence, this now is secondary evidence and not admissible. First, it

does not say to whom these charges were made, or why they were made. It is just a sheet of paper with some writing on it.

Mr. Carrington:

The books are here in Court and if he testifies he made a detailed statement from the book it is a question for the opposing counsel to make inquiries now of any item. We cannot put voluminous matter in the record. The books are here and this is a statement made by the witness who kept the books and made a memorandum of all accounts and any account is always admitted in evidence, if made by the party who kept the books.

The Court:

The objection is sustained.

Mr. Carrington:

Exception is noted to that ruling.

Q. Take the books. I will ask you to look at the book which shows the purchase of the barge. I am handing you a book marked Libelant's Exhibit No. 3 (Handing book to witness). Tell the Court what it is.

A. $4,590.60.

Q. Tell the Court what it is.

A. This represents the cost of the barge complete, with the exception of the pumps.

Mr. Carrington:

We offer in evidence Libelant's Exhibit No. 3.

Mr. Van Siclen:

I object to this Libelant's Exhibit No. 3. It don't say whose account is, although it does have a place for the account name and address.

The Witness:
Look at the account where it states

Mr. Van Sielen:
You didn't show me that.

The Court:
Is this the original entry?

201 The Witness:
Yes; it is the original entry in my subsidiary ledger.

The Court:
Where is the original entry?

The Witness:
They are made from vouchers and checks and transferred from the vouchers and checked to the general ledger.

The Court:
This is not the original entry?

Mr. Carrington:
The original entries of record are entries made from vouchers, etc. The law specifically states that you do not keep the papers little slips of paper to be used in evidence, but when the entry is made from these slips of paper that is the original entry.

The Court:
This book does not show here anything about a barge?

The Witness:
On a former page it does. That is a continuation of a former page.

The Court:

You have only marked one part of the page. It is marked over here (indicating.)

(The Reporter then marked another page of this same book as Libelant' Exhibit No. 3.)

Mr. Van Siclen:

I make the same objection, may it please the Court. Here we have several entries, the name P. E. and I. and the address of Barge. We are now hearing the damages suffered by one Thomas Lombard, and not P. E. & I. and P. & E. S.

The Court:

This witness testified that he kept the books and he testified that this book, which shows that it is a barge and he says this is the page of the book which deals with this barge. If that is the original entry in the book taken from slips of paper you don't have any journal or any other book?

The Witness:

Absolutely; the voucher register and the check register.

The Court:

And the voucher register shows what each of those vouchers are for?

The Witness:

No; there is no detail in the voucher register, but the voucher is in the register, showing the distribution and the detail is carried here in a lump sum.

The Court:

Therefore, the original entry is this (indicating.)

The Witness:
Yes, sir.

The Court:
And you follow it from your voucher register in that book?

The Witness:
Absolutely.

The Court:
Except you have also a journal?

The Witness:
No, sir; I have a check register.

The Court:
As I understand it, all of this stuff here in the book—

The Witness:
This entry here (indicating) would be $200 18 c 2 checks that were paid to Mr

202 The Court:
As I understand it—I am not a bookkeeper what you must have are books of original entry. The vouchers are not necessary, because the vouchers are the memoranda from which he took his stuff. The first thing he did was to enter the charges of the vouchers in here, then they were charged on the ledger and his check register here will show the payment of these amounts that are charged. Is that correct?

The Witness:
Yes.

The Court:

The way to save time is to admit these books and we can follow up those entries afterward; and if counsel will agree after examining these books and tracing these alleged expenditures through these books, we can shorten the case. Not that you agree that the books are admissible, but you agree that the books do show these items that he has testified to here on the stand. Otherwise it is going to be a long-drawn-out affair.

Mr. Carrington:

My idea is—to start with this book otherwise we will have to be here a month.

Mr. Van Siclen:

That's the very idea of Admiralty practice letting the damage question go to a Referee, because we can take days and days at it. My theory of the law in the case, in so far as the books is concerned, we now have here an account, with P. & L., and something that don't refer to the case at all. Mr. Lombard is not named in that Exhibit and I would hesitate to stipulate to admit it.

The Court:

I don't ask you to stipulate to admit the books. We admit the books over your objection and allow your exception. The only thing was whether or not you would then agree to admit the books for whatever they are worth to show these expenditures that were made. Of course, you would have to satisfy yourself as to the books.

Mr. Van Siclen:

I would want to do so and I would have to have someone here with knowledge of bookkeeping to assist me.

The Court:

With this witness here, it wouldn't take me very long to ask him to show me in the voucher book where the cost of the barge is, and if he says that's the voucher No. 1 under P. & E. I. for $2,000, I could ask "What does that mean?"

203 The Witness:

P & I and on down the line.

The Court:

The objection to that book, as offered at this time, is sustained, because it is not the original entry.

Q. Showing you the first book (handing book to witness), what is it?

A. No. 1 voucher, 2000.

Q. And this record was kept by you, was it not?

A. It was kept by me.

Mr. Carrington:

We will withdraw Libelant's Exhibit No. 3.

The Court:

Let it be withdrawn.

Q. I am handing you a book marked Libelant's Exhibit No. 3 on page 1 thereof, and I will ask you to tell the Court what that book is; what it contains.

A. This book is a voucher register; every transaction of the business is covered by a voucher, no matter what it is, and the values are posted in this book.

Q. And that book, Libelant's Exhibit No. 3, is the first original entry of all vouchers that come in connection with the barge that was sunk. Is that correct?

A. That is correct.

Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 3. The other No. 3 has been withdrawn.

Mr. Van Siclen:
What does P. & E. stand for?

Witness:
Plant and equipment investment.

Mr. Van Siclen:
Is there anything in this book that will show whose account it is?

The Witness:
I don't know that the name is in there, but I will say that it is the account of Mr. Lombard's company in Panama City.

Mr. Van Siclen:
Is that a Company?

The Witness:
Is it not Panama Sand?

Mr. Van Siclen:
I have no objection to the admission of this book.

The Court:
Let it be admitted.

Q. From the record, Libelant's Exhibit No. 3, did you make a memorandum?
A. I did.
Q. Of the expenses?
A. I did.

Q. Of the cost of operation?

A. Yes, sir.

204 Q. The memorandum here that is marked Libelant's Exhibit No. 2, was that made from the book Libelant's Exhibit No. 3? Is that a summary?

A. Yes; understand there are always 2 books of original entry.

Q. Which is the other book; let's get that in first.

A. This (Libelant's Exhibit No. 2) is prepared from 2 books.

Q. I am handing you a book marked Libelant's Exhibit No. 4 (Handing book to witness) for identification, and ask you to state what it is.

A. This book contains a record of checks and a record of all accounts.

Q. Is that an original entry?

A. It is an original entry.

Q. Is it the first book that you use in connection with the checks made out by you and kept by you?

A. Yes; made by me and kept by me.

Mr. Carrington:

We offer in evidence Libelant's Exhibit No. 4.

Mr. Van Siclen:

National City Bank means checks drawn on National City Bank?

The Witness:

Yes; account with that bank.

Mr. Van Siclen:

And this is a record of entries of the Panama Sand Company you say?

The Witness:

Yes.

Mr. Van Siclen:

If it please the Court, I object to the offer in evidence of the account of the Panama Sand Company. There is no such person before the Court now that I know of. I don't know why we should waste our time with the accounts of the Panama Sand Company.

The Court:

Objection sustained.

Mr. Carrington:

It is a record in connection with the barge.

The Court:

If Mr. Lombard is bringing this suit and he claims certain damages as Mr. Lombard he cannot prove his claim by the Panama Sand Company books, unless he proves that Thomas R. Lombard and the Panama Sand Company are one and the same fellow.

Mr. Carrington:

I will prove that through the witness.

Q. Who operated this Panama Sand Company that you just referred to?

A. Mr. Lombard.

Q. And is Thomas Lombard the same as the Panama Sand Company?

A. Yes.

Q. That is, this book was kept for Mr. Lombard?

A. To my knowledge.

205 Q. What is his name?

A. Mr. Lombard operated the Panama Sand Company.

Q. And that name "Panama Sand Company" was placed there because of the operation of sand by Mr. Lombard, was it not?

A. Correct.

Q. And all these checks from which these vouchers were made are signed by Mr. Lombard, personally, are they not?

A. Yes; every one.

Mr. Carrington:

We renew our offer.

Mr. Van Siclen:

Who comprises the Panama Sand Company—the personnel?

The Witness:

Mr. Lombard.

Mr. Van Siclen:

Solely Mr. Lombard?

The Witness:

You mean who is operating it?

Mr. Van Siclen:

No; who is the Company?

The Witness:

Mr. Lombard, Dr. Reeder, and Mr. Morris.

Mr. Van Siclen:

Then, may it please the Court, I still insist that Mr. Lombard has brought a suit here as sole owner of a barge that he has lost and asks damages for that barge and now we find that that barge belongs to a partnership. It may be that he was operating a barge for himself and and also barges for someone else. I think Mr. Lombard is the sole party in interest but if it should prove that the barge belonged to a Company, partnership or corporation, he would be out of

Mr. Carrington:

It does not matter what name is carried in connection with this account—not a bit; it refers to one barge; and Mr. Lombard alleges that he is the owner and sole operator of this barge, and these accounts, regardless of how they are carried, the witness testified, pertain to that barge; and he also testified that the checks were signed solely by Mr. Lombard and in his own name—the checks here in these books.

Mr. Van Siclen:

Certainly, in answering the libel, I did admit that Mr. Lombard was the owner. I had no way of finding out anything else, but I now find out Mr. Lombard didn't own the barge, perhaps. I hereby, in open Court, amend that libel and—

206 Mr. Carrington:

I object. The case is tried on the pleadings on the complaint and answer.

The Court:

The motion for amendment is denied.

Mr. Van Siclen:

I except.

The Court:

On the admission of this book, the situation as we see it is simply this. Mr. Lombard claims that he is the owner of that barge—he has so testified here. He says that he has suffered certain damages, and he has so testified. He is called upon to produce his books, which is the best evidence and the only evidence we can accept. He produces what he says are his books, which the witness says are the books of the Panama Sand Company. Thomas R. Lombard when asked if these are the books of the Panama Sand Company,

he says no, they are mine. The checks are signed by Thomas R. Lombard; is it true that that the Panama Sand Company is Thomas R. Lombard, or is it Thomas R. Lombard and Dr. Reeder and somebody else? The witness has identified the books as not the books of Thomas R. Lombard at all, but of a company in which Mr. Lombard is not the only man. The exception is good and must be sustained.

Mr. Carrington:
I except.

(Witness excused.)

THOMAS R. LOMBARD, was recalled as a witness for the Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. In connection with the barge which was sunk, who was the owner of that barge? Who bought it? Who was the owner?

A. I bought the barge, and Dr. Reeder and I were going into a partnership in the sand business—a private arrangement, in which I was to examine the whole proposition—he was to loan me money for that purpose. We, later, decided to make a sand company out of it and incorporate. During the time of incorporation and before everything could be turned over to the Company at the time we were hit we were hardly—we were neither one nor the other—everything was in my name, and the only way we could do business was under my name. It later became the Panama Sand Company. All the assets of Thomas R. Lombard were turned into the Company.

Q. When did it go into the Company?

A. The exact date of that I cannot tell. I think it was after the accident, when I had to get more money to go ahead.

207 Q. In regard to this particular barge, during the entire course of its operation and up to the time it sank, who was the sole owner of that barge?

A. I was.

Q. The Company was not yet organized?

A. That Company was not yet organized; it was in contemplated organization at that time, and this account in the bank was not Panama Sand Company, it was an account I had in the bank and called "Sand Account"—"Panama Sand." You will see when the change of the books took place—where it was the Panama Sand Company Account checks. All this is for the same purpose and the same thing—this was the original stuff that was owned by me, some of it is not even all transferred to the Company as yet, because we just simply haven't gotten around to it.

Q. In other words, there was no corporation or partnership known at the time the barge was sunk?

A. No.

Q. And these accounts as they appear here in your books in—

A. You can answer all that question by showing the vouchers—they show "Panama Sand" not "Panama Sand Company"; that was the marking of my—

Q. These books don't show anything about Panama Sand Company?

A. They don't.

Q. The Panama Sand Company is operating now?

The Court:

The witness testified and we tried to find out whether Mr. Lombard was the owner of the Panama Sand Company.

Q. When was the Panama Sand Company organized? After the boat was sunk?

A. I cannot tell you; you would have to look up on that check register. You will find that the checks there that cover these barges are signed "Panama Sand," "Thomas R. Lombard." When the corporation went on the checks were changed to "Panama Sand Company, Incorporated", signed by Thomas R. Lombard, Treasurer.

Mr. Van Siclen:

If it please the Court, I think that the testimony now being offered is testimony that tends to impeach and does impeach the testimony of the former witness, and it is certainly not possible under any theory of law allowable. They are impeaching the other witness, because in answer to that question he has already stated that they were incorporated at that time.

208 The Court:

Is that an objection?

Mr. Van Siclen:

I object to this line of testimony, on the ground that it tends to and does impeach the previous witness.

The Court:

The objection is overruled, on the ground that this testimony is an attempt to explain the testimony of the other witness.

Q. (Handing checks to witness) I hand you for identification Libelant's Exhibit No. 5, consisting of 20 checks canceled checks and ask you if those are the checks you refer to in your present testimony relative to your ownership and operation of the barge.

A. Yes; these checks were issued by me in operation of the barge, and business.

Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 5, consisting of 20 checks.

Mr. Van Siclen:
Why was it necessary for you to write over your name "Panama Sand Company?"

The Witness:
I couldn't write it. That is the reason "Panama Sand Company" is scratched out. The bank would not accept it, because the Company was not incorporated.

Mr. Van Siclen:
Would they accept the check of a partnership, if you called it a company?

The Witness:
No; not unless it is registered.

Mr. Van Siclen:
Why did you write "Panama Sand, Thomas. Lombard?"

The Witness:
Because that was a private account, separate from my personal account, just the same as we used to carry T. R. Company and Lombard and Company account. I had 7 different accounts at one time down in Panama, all of them representing different jobs; they all meant me.

Mr. Van Siclen:
I object to the exhibit on the grounds that they don't bear on the damages.

The Witness:
They do bear on the damages.

Mr. Van Siclen:

They do not say whether it is an expense on the barge, or whether he owns a barge.

The Court:

Do I or do I not understand that these are offered by the witness for the purpose of showing, and solely for the purpose of showing that at the time these checks were issued it was Thomas R. Lombard that was running this place and not the Panama Sand Company?

269 Mr. Carrington:

Yes.

The Court:

Is that what they are actually for?

Mr. Carrington:

To show he owned the boat and paid all the expenses.

The Court:

What we are trying to find out is whether Thomas R. Lombard was the owner of the barge at that time. He said he didn't know the time the transfer took place and suggested that these checks would show that Thomas R. Lombard was the owner at that time.

Mr. Van Siclen:

We contend against their admission as being incompetent for that purpose.

The Court:

Objection is overruled. Let them be admitted.

Mr. Van Siclen:

Exception. For that sole purpose no objection.

Court adjourned until 1:30 p. m.

July 25 1931.

MR. R. K. MORRIS, a witness for the Libelant, was called, and being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.

A. R. K. Morris.

Q. Do you know Mr. Thomas Lombard?

A. Yes, sir.

Q. On the 31st of July, 1930, did you have any interest in or title to a certain barge that was sunk in Balboa Harbor on the 31st of July, 1930?

Mr. Van Siclen:

When we recessed we had someone else on the stand, and he was in the middle of an examination. It appears that we have started a new line of thought altogether. I move that if Mr. Carrington will state he has finished with Mr. Lombard, I would be pleased to cross-examine Mr. Lombard.

THOMAS R. LOMBARD, then resumed the stand for further examination.

210 Direct Examination (Continued).

(Questions by Mr. Carrington):

Q. Have you informed yourself as to when the Panama Sand Company was incorporated?

A. Have I informed what?

Q. Yourself.

A. Yes.

Q. Do you know when the transfer of the property was made the transfer of your property over to the Panama Sand Company?

A. I have got it there, right in that book; in September.

Mr. Carrington:

There is going to be some difficulty, and I may as well state it right now; counsel is going to object that this book is written in Spanish, and I have got Mr. Sheibley to interpret it here. The reason these books were not presented before is that the issue was not raised about the ownership, until the witness on the witness stand stated that the books were here and were books of the Panama Sand Company at the time. This book is in Spanish and I will have to ask Mr. Sheibley to translate it right now, unless Counsel does not object.

Q. (Handing book to witness) I hand you a document marked Libelant's Exhibit No. 6. Please tell the Court what that is.

A. It is a transfer.

Q. What is it?

A. It is one—

Q. Say what it is.

A. It is a transfer of my property and barge, etc. to the Company for a certain consideration of stock.

Mr. Carrington:

We will ask Dr. Icaza to translate this, and offer in evidence Libelant's Exhibit No. 6, with the right to the opposite party to have a translation in English. We offer the book in evidence.

Mr. Van Siclen:

(Indicating in book) Where is the word "transfer?" Before I object, I would like to know something about it. Personally, I don't know one word of Spanish.

The Court:

You have a man back there associated with you who does. Have you any objection to the admission of this exhibit?

Mr. Van Siclen:

Yes; because our code of procedure objects to it—to all documents offered in evidence which are in a foreign language they must be translated—I don't recall the exact Section—it is under the index as foreign documents.

211 The Court:

(Reading) "Documents not accompanied by translations may be excluded by the Court * * * unless some sufficient reason * * *." A sufficient reason has been offered.

Mr. Van Siclen:

I would like to state I am unacquainted with the Spanish language; that I am unable to make an intelligent objection to the use of the book, or document, because it is in the Spanish language.

Mr. Carrington:

The Counsel's associate is a Spanish scholar, and practices law in the Republic of Panama, and Mr. Casto can inform his associates as to what are the contents of the exhibit offered in evidence.

Mr. Van Siclen:

I think the record will show that Van Siclen and Boggs are the proctors here, and we have not called in Mr. Casto, as yet. Mr. Casto is present.

The Court:
What is Mr. Casto doing in the counsel chamber?

Mr. Van Siclen:
He is present to keep up with the procedure in Court, etc. He has practiced here for only a short while.

The Court:
The Court has observed during this trial his writing notes back and forth and suggestions to counsel.

Mr. Van Siclen:
I am not going to argue with the Court. I object to the admission or introduction of the book or document as it is in Spanish and I do not know what it is.

The Court:
The Court is not in a position to know what it is all about. How long will it take to translate it?

Mr. Carrington:
I will withdraw that and introduce one we have translated.

Q. (Handing book to witness) I am handing you a book marked for identification Libelant's Exhibit No. 7, which is written in Spanish with an English translation of the same. Will you please tell the Court what it is?

A. This is a Directors' meeting, Panama Sand Company.

Q. On what date?

A. 30th of September, 1930.

Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 7, which is in Spanish with an English translation.

Mr. Van Siclen:
I object to the introduction of the book and translation, because it is a book of the Panama Sand Company, which is not a party to the procedure.

The Court:
Objection overruled.

212 Mr. Van Siclen:
Exception.

Q. On the 31st day of July, 1930, did Dr. Dennis G. Reeder, and Mr. R. K. Morris have any right, title, or interest in and to the sand barge that was sunk in Balboa Harbor?
A. No, sir.

Mr. Van Siclen:
I am trying to make a proper identification of the barge, and in a matter of the record, which might go further, we ought to know what barge it is. Mr. Lombard has testified, under oath that the barge is numbered 4584, and if Counsel will agree to call it Barge No. 4584, that is the number of the license plate that the barge has.

Mr. Carrington:
Sure.

Mr. Van Siclen:
I can see a good deal of difficulty in New Orleans, if it goes there, as to the barge. There are millions of barges and if we can identify this barge as No. 4584, as testified to by Mr. Lombard in his answers to interrogatories, it would be an advantage.

The Court:
Does counsel agree?

Mr. Carrington:

Yes; I agree to that, just to save time. They will know there were not millions of barges sunk in Balboa Harbor on July 31st, 1930.

The Court:

Let the record show that Counsel agree that the barge is No. 4584, that being the license number of the barge.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. What caused you in the course of an hour and a half to learn that on July 31st, 1930, you were the sole owner of the barge?

A. I wanted to find out definitely the date of the Company; the Company was a contemplated thing, but not an actuality.

Q. And now, from the document entitled Libelant's Exhibit No. 6, you find that on that date the Company was incorporated. Is that so?

A. Yes; the transfer of the Company came into existence; the transfer was made.

Q. And what was the consideration you received for your share—

Mr. Carrington:

That is objected to as immaterial, because the record shows that this thing was done—this transfer was made on the 30th of September, 1930, and has nothing to do with the loss of the barge on July 31, 1930.

Mr. Van Siclen:

He, apparently, sold his interest.

The Court:

The question, as I understand it, is whether or not he owned this barge on July 31, 1930, or whether it belonged to the Panama Sand Company on that date?

213 Mr. Carrington:
Yes.

The Court:
All of this testimony is taken on that proposition and that proposition alone. Objection is sustained.

Mr. Van Sicien:
Exception.

Q. You incorporated on September 30th?
A. I think that was the date.
Q. Sir?
A. I have not got the paper; the exact date. I did not get a copy.
Q. You had the paper a moment ago.
A. That's all right; I am not relying on my memory.
Q. Then you don't know when it was incorporated, do you?
A. If I had the paper I could tell.
Q. What is your idea?
A. The date you just mentioned—and it might have been the 25th, and unless I see the translation I am not going to say.
Q. You think it might have been incorporated on October 25th?
A. No; I didn't say October 25th.
Q. It was some ime around October 25th or October 30th?
A. I don't remember the exact date that length of time.
Q. (Handing witness paper) Handing you this paper that you say you don't know anything about—
A. Don't talk like that to me here or anyplace else.

The Court:

If you folks can't conduct yourselves differently, the Court will decide as to how you can talk, and if we start to decide as to how you can talk we may let you stay in certain places that we have in mind to think these things over. Gentlemen, you are in a courtroom and we want it distinctly understood that you must conduct yourselves accordingly. That is for both counsel and the witness. I want no repetition. I am running this Court and I want it thoroughly understood that I want none of this argument, going on. What we are trying to do is to get the facts, and there are no privileged characters here.

Q. That is a document referring to a directors' meeting, is it not?

214 A. It is.

Q. And what does it say about the incorporation?

Mr. Carrington:

The document speaks for itself. The question is objected to.

The Court:

Sustained.

Q. That is the minutes of a directors' meeting, is it not?

A. It so states.

Q. And you say it is, do you not?

A. Yes.

Q. And that was September 30th, does it not?

A. Yes.

Q. What year?

Mr. Carrington:

The document speaks for itself. I object to the question.

The Court:
Sustained.

Q. If you incorporated on September 30th, did you hold a directors' meeting immediately then?

Mr. Carrington:
Objected to as immaterial.

The Court:
Overruled.

A. I think that this company went into existence the day that it started to function.

Q. Is it incorporated under the laws of Panama?

A. Yes; Panama.

Q. And on the 30th day of September you had a meeting?

A. Yes.

Q. You think that on September 30th you incorporated and had a meeting?

Mr. Carrington:
That is objected to. The document speaks for itself. The document will say what happened.

The Court:
Objection overruled.

A. The document there says that that is a meeting of the stockholders of the Company.

Q. For the benefit of the Court, I will ask you to read the title of that out loud and for the record.

A. (Reading) "Meeting of the Board of Directors of the Panama Sand Company, Incorporated".

Q. That does not sound like a meeting of the stockholders, does it?

A. They happened to be all the stockholders.

215 Q. Now you don't know at this time whether on September 30th, the date of this document, this document, or, rather, the date of this meeting, whether that was the date of incorporation, or whether it was some other date, do you?

A. The incorporation papers must have been gotten out sometime previous to that.

Q. You were a corporation previous to this day?

A. Must have been; couldn't have had a meeting unless we had been incorporated.

Mr. Van Sicklen:
No objections to the admission of the exhibit.

The Court:
Let it be admitted.

Q. Who were the incorporators?

A. The incorporators were, I believe, Dr. Reeder and myself and A. B. O'Barrio.

Q. And at the time of the incorporation, whenever that was, they took over your share of the property. Is that it?

A. No; I don't think so.

Q. Did they give you any consideration for your property?

A. I don't remember the exact wording of that paper.

Q. If you are going to prolong this thing with a a poor memory

The Court:
The witness must be protected against those remarks, Mr. Counsel.

Mr. Van Sicklen:
Thank you, sir.

Q. Then at this directors' meeting there was a resolution passed by the Board of Directors (you may look at the paper) giving to you a certain amount of Panama Sand Company stock, in consideration of some contract that you made with the parties stated there?

A. Yes.

Mr. Carrington:-
The document will speak for itself. It is in the resolution right before the Court. I object.

The Court:
Sustained.

Q. Do you know when the incorporation took place?

A. I don't know the exact date; no.

Q. It is a matter of record, is it not?

A. I presume it would be.

Q. And it was possible for you to ascertain the date, was it not?

A. It was, my understanding that this thing had all been settled before. This is the first time the question has been raised.

216 Mr. Van Siclen:
In order to carry out what the Court has asked me, I will ask that the witness be instructed to answer "yes" or "no".

The Court:
Answer yes, or no.

The Witness:
Yes.

Q. And did you so ascertain?

A. I have not.

Q. You have not. So at the present moment you don't know, do you, whether the corporation was incorporated in May of 1930, or September, 1930, do you?

A. It did not function until this date. There was no stock issued—

Q. That is not the answer to the question.

(The Reporter then read the preceding question.)

A. I do not know the exact date; no.

(Witness excused.)

R. K. MORRIS, a witness called on behalf of Libelant, was duly sworn, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. I will ask you if, on the 31st day of July, 1930, you had any interest or title to a barge sunk in Balboa Harbor, which is identified as Barge 4584, a sand barge?

A. No.

Q. At the date of the sinking of that barge, July 31, 1930, were you a stockholder in the Panama Sand Company?

A. No, sir.

Cross Examination.

(By Mr. Van Siclen):

Q. Are you now?

A. Yes, sir.

Q. When did you become a stockholder?

A. A month or 6 weeks later; I don't remember the exact date.

Q. A month of 6 weeks later than July 31, 1930?
A. After the sinking of this barge, June or July, 1930.
Q. July 31st?

217 Mr. Carrington:
I object.

Mr. Van Siclen:
This is cross examination.

The Court:
The objection is sustained.

Q. The Panama Sand Company is now an incorporation is it?
A. Yes.
Q. And when was it incorporated, Mr. Morris?
A. I don't know; I don't remember the exact date; sometime in September, I believe, last year.
Q. Are you sure it couldn't have been in September, 1929?
A. No.
Q. What makes you so sure it could not have been then?
A. Because it was only about a year ago that I became interested in Mr. Lombard and this proposition.
Q. And that is the only reason that you say it was not incorporated in 1929?
A. Yes.
Q. Are you accustomed to entering into business transactions and forgetting about them so quickly?
A. I don't carry around in my head the dates of any transactions.
Q. You have the date?
A. It is not present now.

Q. You haven't got it in your inside pocket?

A. No.

Q. It could have been September 30, 1930, could it not?

A. Possibly.

Q. Did you hold your first stockholders' meeting on the day you incorporated?

A. I was not one of the incorporators.

Q. Then, when did you come into the corporation, Mr. Morris?

A. As soon as it was organized; it you care to have me relate the transaction I would be glad to do so.

Q. When did you come into the organization?

A. When it was organized.

Q. You were not one of the incorporators?

218 A. No.

Q. Hypothetically, if it was organized on on July 31, 1930, would it be possible that you became a stockholder in July, 1930?

Mr. Carrington:

Just a minute. I object to that question. It is not a hypothetical question. It is not based on facts proven or can be assumed to be proven. Hypothetical questions are only asked on facts proven or assumed to be proven.

The Court:

It is a proper question, but not a hypothetical question. The objection is overruled.

The Witness:

I don't understand that question yet.

Q. You have stated that you became a member of the corporation immediately after the incorporation, but you don't remember when the incorporation

took place. If it was so that it was incorporated on June 31, 1930, would you say that you became a member of the corporation in July, 1930?

A. As I understand it, the barge was sunk on the 31st of July—

Q. I am not asking you about the barge.

The Court:

Answer the question. It is clear. If it was organized on June 31, 1930, would it be possible that you became a stockholder in July, 1930?

A. As far as these dates are concerned, my memory is not clear. I did not become interested until some time after the barge sunk, on July 31st.

Q. So if the company was incorporated on June 30, 1930, you did not become a member immediately thereafter, did you?

A. I did not become interested in it, until sometime after the barge sunk.

(Witness excused.)

DR. D. F. REEDER, a witness for the Libelant, was called and after having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.

A. D. F. Reeder.

Q. Are you a member of the Panama Sand Company?

A. Yes, sir.

219 Q. How many of you form that company?

A. Three.

Q. Who are the three?

A. Mr. Lombard, myself, and Mr. O'Barrio.

Q. On the 31st of July, 1930, did you or the Panama Sand Company have any interest in the barge that was sunk in Balboa Harbor, which bore license number 4584?

A. No, sir.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. When was the Panama Sand Company incorporated?

A. I think it was in September, 1930?

Q. In the middle of the month, first of the month, or last of the month?

A. I don't remember ~~exactly the date the~~ papers were signed.

Q. You don't happen to have a copy of your incorporation with you, do you, Doctor?

A. No, sir.

Q. And the organizers were yourself, Mr. Lombard and Mr. O'Barrio?

A. Yes.

Q. Prior to that you and Mr. Lombard had some business together, did you not?

A. Yes, sir.

Q. What was that business, Doctor?

Mr. Carrington:

That is objected to as immaterial. It is immaterial what business the Doctor and Mr. Lombard had prior to the incorporation of the Sand Company.

The Court:

Unless it is confined to the Sand Company?

Mr. Carrington:
Yes, sir.

Mr. Van Siclen:
I am trying to build up the question which may be taken for what it is worth—perhaps his answer might be the Sand Company, or the Hospital.

Mr. Carrington:
That is speculative.

The Court:
This witness must be protected from inquiries as to any other business. The objection is sustained.

Mr. Van Siclen:
I will withdraw the question.

Q. Prior to September did yourself and Mr. Lombard have any business together regarding sand?

A. Yes, sir.

220 Q. When did that begin?

A. That must have begun at least 6 months prior to the date of the forming of this company.

Q. At that time you and Mr. Lombard were gathering sand prior to the incorporation?

A. I would not say that, exactly; no, sir.

Q. In what way were you engaged in the sand business?

A. I had been negotiating with him in regard to sand, but I was not engaged in the sand business, primarily.

Q. You received none of the profits and paid none of the expenses?

A. No; if you want me to tell definitely what it was, I will tell what relations we had at that time.

Q. We are not interested in anything outside of whether or not you were engaged with Mr. Lombard. On or about July 19, 1930, then you were interested in sand, were you not?

A. No, sir.

Q. You were not?

A. I was interested with Mr. Lombard, but not in sand.

Q. You and Mr. Lombard worked together on the sand proposition, did you not, on July 19th?

A. We were working on the proposition of forming a company to exploit sand.

Q. And on that date, July 19th, you were advancing money towards the handling of sand, etc., were you not?

A. As a loan.

Q. As a loan?

A. That was the extent of my interest at the time.

Q. And upon what condition was this loan made?

Mr. Carrington:

That is objected to.

The Court:

Overruled.

A. The loan was made on the condition that if and when this thing went fluey Mr. Lombard was to pay it all back.

221 Q. Which thing went fluey?

A. It was made under the condition that if he could not demonstrate the fact that he could produce sand, why then it was a loan, and if he could produce sand then a company was to be formed in which I was to take stock.

Q. This loan that you made on July 19th—

A. I wouldn't say I made a loan on July 19th.

Q. It was a note, was it not?

A. I don't think so; I don't believe he had a note.

Q. The loan was made under circumstances whereby Mr. Lombard for at least the duration of the loan accepted you as a partner. Isn't that so?

A. You might, by some stretch of the imagination, say so. It is not true. In fact, there was no partnership.

Q. It was considered so between the two of you?

A. No; it was considered as a loan between us.

Q. And you don't know the exact date of the incorporation?

A. No, sir; it is a matter of record in the Notary's office.

Q. And that, of course, is available to you?

A. It is available to anybody.

Q. And available to Mr. Lombard?

A. I suppose so.

(Witness excused.)

H. B. ROWE, was recalled as a witness for the Libelant, and testified as follows:

Mr. Van Siclen:

I move that the testimony of the previous witness be stricken as being immaterial, he having testified to matters having to do with the Panama Sand Company, according to his own assertion.

The Court:

We will reserve our ruling on that.

Cross Examination.

(Questions by Mr. Van Siclen):

Mr. Van Siclen:

This book, Libelant's Exhibit No. 4 is an account of the National City Bank for the months—of the Panama Sand Company, you previously testified, for the months of December, 1929, and January, 1930, to and including February April, 1931. Is that correct?

A. No.

Q. What is it?

222 A. Because it couldn't possibly be the account of the Panama Sand Company until the Panama Sand Company existed. It was the account of Thomas R. Lombard before that.

Q. So what you said this morning you didn't mean?

A. Absolutely.

Q. You meant everything you said?

A. These books are the books of the Panama Sand Company.

Q. You know you are under oath.

A. Absolutely.

Q. Show me by this book when the Panama Sand Company started their account.

A. I cannot tell you.

Q. You don't know?

A. No; not when the incorporation took place.

Q. They didn't inform you?

A. No.

Q. And you carried along just the same as you previously carried along?

A. I know the stock was issued in September.

Q. In September?

A. Yes.

Q. Are you acquainted with the issuance of stock in a corporation?

A. That was when it was incorporated.

Q. Are you acquainted with the issuance of stock by a corporation? You say it was incorporated in September?

A. Yes.

Q. 1930?

A. That's when the stock was issued.

Q. You don't know, of your own knowledge when it was incorporated, do you?

A. I know that Mr. Lombard told me in September of 1930 that he was issuing the stock and for me to charge it in the proper way, which I did, in that month.

Q. You don't know whether that was stock of a corporation which had been operating in 1918 or 1930?

A. Of my own knowledge, no; I don't know when it was incorporated.

223 Q. And having been told in September that stock was being issued, did you not record the accounts for the corporation?

A. I did.

Q. Showing—

A. If I understand you correctly, you mean did I charge the stock out in a proper way. Is that what you mean?

A. No; the book here shows (looking at Libelant's Exhibit No. 4) the book here shows that on January 2, 1930,

A. Yes.

Q. a certain check on the National City Bank was issued. Is that for a certain amount?

A. Yes.

Q. We have a heading here. Now on August 1st—what year is that?

A. 1930.

Q. This month of August—

A. It is carried right on.

Q. (Indicating) Then this is August, 1930?

A. It comes along; the next page is August—it follows July.

Q. You know we have a month of August in all these different years?

A. This follows the natural sequence.

Q. I don't want to stand on technicalities, but her on let's get the page marked 1930. Here is Septem ber? When was that?

A. 1930.

Q. I mean where?

A. 1930 is not stated there; you will find it here 1930 (indicating). June, 1930.

Q. Isn't that sort of lax bookkeeping?

A. I don't know. Is it?

Q. I don't know anything about bookkeeping. am asking you.

A. I don't know.

Q. I am asking you now to show, for the benef of the Court and the record where the change wa made in the keeping of the books between the tim that you allege now that Mr. Lombard was sole owne and when it became a corporation.

A. There was no change in the keeping of th books, excepting the stock was set up and issued.

Q. Does the record show to whom th
224 stock of the corporation was sold?

A. Yes.

Q. To whom was it sold?

A. It was sold to—

Q. Does Libelant's Exhibit No. 4 show it?

A. No; that is this one (indicating another book

Q. Will your records show?

A. Yes.

Q. Will your record marked Libelant's Exhibit N 3 show it?

A. This does not show to whom it was issued.

Q. Have you a record to show it?

A. Yes; but not in this book.

Q. Have you another one which is an exhibit her now?

A. It is not an exhibit, but this shows that th stock was issued.

Q. Does that have 1930 in it?
A. Yes; it has 1930.
Q. You put that in that book?
A. Yes; that is in September, 1930.
Q. Now, you have testified to being a public accountant in the City of Panama.
A. No.
Q. You are not?
A. I have not testified to that—being a public accountant.
Q. Are you an accountant in the City of Panama?
A. I am an accountant, not a public accountant.
Q. Do you operate a business of accounting?
A. That is my profession.
Q. That is your profession—accounting—and as an accountant, practicing your occupation or profession in the City of Panama, you, of course, are cognizant of the rules governing accounting, are you not?
A. I think so.
Q. Is there any law or ordinance or any other matter that requires a book to be registered in Panama?
A. That I cannot answer; I have never done it myself.
Q. You have never done it yourself?
A. No.
Q. You have not registered these books?
225 A. These books are not registered in Panama.

Re-Direct Examination.

(Questions by Mr. Carrington):
Q. Have you there, Mr. Rowe, a book which shows the amount of stock transferred to Dr. Reeder and when it was transferred?
A. Not to Dr. Reeder alone.
Q. To the stockholders?
A. Yes.

Q. Looking at Libelant's Exhibit No. 3, state to the Court what your record shows in connection with the transfer of the stock to the stockholders and when.

Mr. Van Siclen:

May it please the Court, the question is as to the ownership of the barge. They may have transferred stock anywhere. I object to the question as being irrelevant and immaterial.

The Court:

You asked him about it on cross-examination. This is redirect. You may proceed.

A. It shows the stock was issued in September, 1930.

Q. To whom does it show that stock was issued?

A. It does not show it in this book.

Q. Have you a book that it is shown in?

A. Absolutely; but if has not been admitted in evidence.

Q. It is here in Court, is it?

A. Yes.

Q. I hand you Libelant's Exhibit offered in evidence this morning and later withdrawn. I am handing you a book called Libelant's Exhibit 8 and ask you if, from that book, you can find the date the stock was transferred to the stockholders of the Panama Sand Company and to whom. I would like to have it determined whether that was the original entry that was made.

A. Yes.

Mr. Van Siclen:

They were not; that was determined before.

The Court:

Do you object?

Mr. Van Siclen:

Yes; I object. I have not been offered the book; I have not seen the book. I object to the form of the question?

The Court:

Sustained.

Mr. Van Siclen:

I will ask that I have a chance to look at the book.

226 The Court:

Counsel will understand it has not been identified yet.

Mr. Carrington:

I was going to suggest that if he could find it he could say yes or no; I didn't ask him to read it into the record.

The Court:

That is correct. The objection to the form of the question is sustained.

Q. Were entries in that book made from any other record that you have?

A. They were made from memoranda: from the same records as the Voucher Register was.

Q. And that Voucher Register is Exhibit No. 3?

A. Yes: No. 3.

Q. Get the Voucher there in Libelant's Exhibit No. 3 and show us.

Mr. Van Siclen:

Am I not to have a chance to know what he is testifying about?

Mr. Carrington:

I am going to offer that in evidence. I withdraw those questions.

Mr. Van Siclen:

I will ask that the record show that the witness hesitated a considerable time in making his answer.

The Court:

I don't see why the record has to show that. I am supposed to see what the witnesses are doing and the way they are acting.

Mr. Carrington:

I withdraw the questions, because we have there in evidence now the issuance of the stock to the stockholders on a certificate that has been admitted in evidence. There is no use in going over the same thing twice.

The Court:

Let the record show the withdrawal of all the questions.

(Witness excused.)

Mr. Carrington:

These books are used by the company in the business going on now; that is why I got a memorandum of the account in summary form for the purpose of the Court, so these books can be carried on.

The Court:

Your difficulty arises in the fact that the memorandum was taken from some books that belonged to the Panama Sand Company and you have been trying to prove that Mr. Lombard was the whole Sand Company prior, apparently, to September, 1930.

Mr. Carrington:
Yes.

The Court:
It shows the absolute necessity for the rule that Courts must accept only books of original entry. Your transcript was not worth anything until we
227 have it explained as to what these books are.

Mr. Carrington:
Now that they are explained, I will ask that the books be withdrawn and the memorandum offered as Libelant's Exhibit No. 2 substituted for them.

The Court:
If you will check over the record of the testimony of this witness and Mr. Lombard you will find the record does not show all of these books have been admitted in evidence. Some have been offered, and some have not.

Mr. Van Siclen:
It would be very agreeable to us that they carry on their business; although the books show there have been no entries in them since April, they may withdraw them. I have no objections to their withdrawing them.

The Court:
You mean the withdrawal of the books that Dr. Carrington mentioned?

Mr. Van Siclen:
Yes.

The Court:
And the substitution of Libelant's Exhibit No. 2 herefor?

Mr. Van Siclen:
Absolutely not.

Mr. Carrington:
Then we have to keep the books in Court, and then the business of these people will be tied up, which is contrary to the provisions of the law.

The Court:
This man came on the stand this morning and he testified from some memorandum. He said the barge cost $2,000; that $2,590.60 was spent for the improvements, and he went merrily on. In the course of the examination the books were called for, and the Court ruled that the books should be the best evidence. When the books were obtained, they had the name Panama Sand Company on them and we couldn't find the name of Thomas R. Lombard anywhere, and then we got off on a tangent of trying to prove, or you folks did, of trying to prove or disprove that Thomas R. Lombard was in this thing alone in September, 1930, and then after that time this company got hold of this business, and you introduced evidence along that line. Now, Counsel are trying their own case except ..... Now, immediately there is nothing further about these account, and you say now "We want to withdraw the books," and some of them have not been offered in evidence.

Mr. Carrington:
Exhibit No. 3 has been admitted. I would like to call Your Honor's attention to the fact that they books do not show that they are books of the Panama Sand Company.

The Court:
This witness testified that he took them from books of the Panama Sand Company. That was his testimony. Now, he may have changed it later. I am

not talking about what he did this afternoon, but the whole issue with the Panama Sand Company came up in connection with this and it immediately raised the question if this is a suit for Thomas R. Lombard how do you get the book of the Panama Sand Company in? We admit that these books do not
228 show Panama Sand Company or Thomas R. Lombard, but the witness stated something about the Panama Sand Company. Now, I still say, and I am giving counsel on both sides an opportunity to check this record, that these may have been identified. Half a dozen books have been offered here, and there has been no objection and under what name I am not sure myself that while they have been identified, they have been admitted in evidence, whether there have been objections or what has been done, and I will give you an opportunity to find out which books you are going to offer, and you may have an opportunity of trying to withdraw them from evidence, and substitute this other statement. That is up to counsel and not up to the Court.

(A short recess was then taken, Court reconvening at 3:10 p. m.)

ALBERT O'BARRIO, a witness for the Libelant, was called, and, after having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.
A. Albert O'Barrio.
Q. Do you live in Panama?
A. Yes.
Q. Do you know Mr. Thomas Lombard?
A. Yes, sir.

Q. Do you know a company called the Panama Sand Company?

A. Yes, sir.

Q. Do you know of a certain sand barge that was sunk in the Harbor of Balboa on July 31, 1930, which is identified as No. 4584? Do you know anything of that barge?

A. I know Mr. Lombard bought that barge for the Sand Company.

Q. Did you have any interest in that barge?

A. Did I have a—

Q. Did you have any money in it?

A. No.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. How did you know the barge, Mr. O'Barrio?

A. How do I know the barge? I have seen it.

Q. Seen what? What did you see?

A. I seen it the barge.

Q. How did you know it was this barge
229 No. 4584?

A. I don't know its number.

Q. You have seen many other barges haven't you?

A. Oh, yes; yes.

Q. You were one of the original incorporators of the Panama Sand Company, were you not?

A. I was.

Q. When was that incorporated?

A. I don't remember, but it is a matter of record.

Q. Was it during the year 1929?

A. About, I should think.

Q. Who were the original incorporators?

A. If I remember right it was Mr. Lombard, Dr. Reeder and myself.

Q. They composed the Panama Sand Company?

A. Yes.

Q. Did you put any money in it?

A. The laws in Panama require a certain number of Panamanians to be directors of any company incorporated, and Mr. Lombard asked me to be a director in the company and I received no stock. I have not had, or have, any interest in the company whatsoever.

Q. You were merely one of the dummy incorporators, as they say?

A. Yes.

Q. That was in 1929?

A. When the company was incorporated; whenever that was.

Q. It was about 1929?

A. Yes.

Q. You have testified it was about 1929.

A. I don't remember the date; it is a matter of record, and it can be seen by Mr. Lombard's deeds of incorporation which, I suppose, are here.

Q. I don't care about the exact date.

A. I do not remember it.

Q. Do you think it was last year?

A. No; it was not last year.

Q. It was before that?

A. Yes; I think so.

(Witness excused.)

230 Mr. Carrington:

In order to avoid the necessity of having the company tie up all its books up here, I am going to put Mr. Lombard on the stand, so we can get those exhibits withdrawn for use.

THOMAS R. LOMBARD, being recalled as a witness for Libelant, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Mr. Van Siclen:

I move that all of the testimony of Mr. Rowe be stricken for the reason that, as Mr. Rowe himself testified, the books from which he was reading were the accounts of the Panaina Sand Company, and as the last witness testified, such Sand Company was organized during the year 1929, or at least prior to 1930 he made 2 different statements prior to last year and so if we now corroborate or attempt to corroborate the statements set forth by Mr. Rowe it will only be showing the statements of the Panama Sand Company, in which we are not interested. I object.

Mr. Carrington:

Mr. Rowe testified, and he so stated to Mr. Van Siclen that if he would ask him he would explain the books belong to the Panama Sand Company their accounts are carried in the books now, but he showed from the books, Libelant's Exhibit No. 3, the Panama Sand Company did not start as such until September 1930, when the stock was issued. That is his testimony.

The Court:

We will reserve our ruling on that motion pending decision of the case.

Mr. Van Siclen:

I do not want an exception. I am perfectly willing to leave it with you.

Mr. Carrington:

We now ask leave to withdraw the Libelant's Exhibit No. 5, which consists of 20 checks, and we will

offer in evidence just the same Exhibit No. 5 consisting of only two checks.

The Court:
Any objections?

Mr. Van Siclen:
If it please the Court, these exhibits are now a matter of record, and I see no reason for withdrawing them. I cannot see now why they cannot be attempted to be introduced in evidence. They were Panama Sand Company checks.

The Court:
I didn't say they were.

Mr. Van Siclen:
Yes; they are in evidence now.

The Court:
The objection is sustained.

Q. I have you Libelant's Exhibit No. 5, consisting of 2 checks. Will you please state to the Court just what those 2 checks are?

A. The first and last payment made on the barge to Henry O'Barrio.

231 Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 5, consisting of 2 checks.

Mr. Van Siclen:
I object. Libelant's Exhibit No. 5 consisted of 20 checks.

The Court:
Objection sustained.

Mr. Carrington:

I asked permission to withdraw 20 checks and substitute 2 checks.

The Court:

Objection was made and sustained. It is already in evidence as Libelant's Exhibit No. 5.

Mr. Carrington:

As I understand, counsel has objected to the withdrawal of any of the checks?

The Court:

You asked leave to withdraw Libelant's Exhibit No. 5, which consisted of 20 checks, to which counsel objected, and the objection was sustained.

Mr. Carrington:

All 20 checks are still in evidence?

The Court:

They are.

Q. Now, I will hand you Libelant's Exhibit No. 9, marked for identification, and same consisting of 4 sheets of paper, together with an English translation of one sheet which is in Spanish, and ask you if you know what it is.

A. It is the Machine Company's bill for the machinery installed in a barge, together with bill of lading, and insurance papers.

Mr. Carrington:

We offer in evidence Libelant's Exhibit No. 9.

Mr. Van Siclen:

I object to Libelant's Exhibit No. 9, on the ground that it is dated the 5th day of February, 1930, and

has to do with the—this is a consular certificate, having to do with certain machinery shipped to Mr. Lombard, or rather the machinery with marks of Thomas R. Lombard and consigned to the order of the National City Bank of New York, Panama City Branch, are dated February 5, 1930, and the Panamanian document is dated the 5th of February, 1930. We are now taking up a matter of something that happened in July, 1930.

The Court:

Is it offered regarding machinery that went into this boat?

Mr. Van Siclen:

Yes; and that machinery, it was testified, was salvaged was taken off the barge.

The Court:

Counsel seems to be confused with the proposition that anything that happened everything is confined to July, 1930. We are trying to prove value by what they paid for these things. It is true that there was salvage of the machinery and that is to be taken into consideration. That does not make these documents inadmissible. The objection is overruled.

Mr. Van Siclen:

Exception.

232 Q. I hand you herewith document consisting of 2 sheets of paper, marked for identification Libelant's Exhibit No. 10, and ask you to state to the Court what that is.

A. Installing pumps previously mentioned in the other document.

Q. What is that thing?

A. A bill from The Panama Canal for installing those pumps in the barge.

Mr. Carrington:

We offer in evidence Libelant's Exhibit No. 10.

Mr. Van Siclen:

One sheet of Libelant's Exhibit No. 10 appears to be a copy of something, a bill for 2 barges, coastwise, No. 2 and 11-2 barges apparently. We object to its admission.

The Witness:

No: they give—

Mr. Van Siclen:

In care of Thomas Lombard. It seems to me a copy of the proposition; I ask if the original is in your possession.

Mr. Carrington:

That is an original signed by the Collector of The Panama Canal the name of the Collector, initialed by him, and attached.

Mr. Van Siclen:

I object to its admission.

The Court:

The objection is overruled. Let it be admitted.

Mr. Van Siclen:

Exception noted.

Q. I hand you a document, Libelant's Exhibit No. 11, consisting of 3 sheets of paper, and ask you to state to the Court what that Exhibit is.

A. One is a bill of $140.00.

Q. State what the exhibit is. The Exhibit consists of 3 sheets of paper. The Court will be able to tell what each represents.

A. It represents part of the money paid to The Panama Canal for the attempted salvage of the barge.

Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 11.

Mr. Van Siclen:
No objection, if it please the Court.

The Court:
Let it be admitted.

Q. I hand you a document marked Libelant's Exhibit No. 12 and ask you to state to the Court what that document is.

A. Payroll month of August.

Q. For what purpose?

A. All charges direct, salvage and machinery.

Mr. Carrington:
We offer in evidence Libelant's Exhibit No. 12.

Mr. Van Siclen:
"All charges to erect and salvage and machinery"; who wrote that, you?

A. I wrote that.

233 Mr. Van Siclen:
I object, as the bill has been offered to show that it is a charge. It looks like something in Spanish that I don't know anything about.

The Witness:
What?

Mr. Van Siclen:
It looks like monthly payroll. Mr. Lombard says all charges direct.

The Court:
Did you write that at the time this was made out?

The Witness:
It was written for the information of the Bookkeeper. You will find it on the back of most all the checks drawn.

The Court:
Objection overruled. Let it be admitted.

Mr. Van Siclen:
Exception.

Cross Examination.

(Questions by Mr. Van Siclen):
Q. Handing you Libelant's Exhibit No. 12. What is this "E. Smith" with the dashes there? (Indicating.)
A. He was a monthly man.
Q. And worked 3 days?
A. He worked all through the month.
Q. What is this here (indicating)?
A. Pence Day worked there.
Q. What does that say in English?
A. Days worked.
Q. Days' service, does it not?
A. Days of service—$100 a month.

The Court:
When he says "Days worked" it means days of service?

The Witness:
$100 is the rate per month.

Q. He received $9.99 for 3 days?
A. Yes.

Q. Who is the next man?
A. A. Dew.
Q. What did he do?
A. He worked and got $75 per month.
Q. You didn't put a day's work in there for him (indicating)?
A. No.
Q. And the next man?
A. ..... a $40-a-month man. If he had worked a month he would have got $40.00.
234
Q. And the next man?
A. Neff, $40 a month man and he worked $17.35 worth.
Q. You didn't show him any days worked, then?
A. He has got $17.35.
Q. It is calculated at days' service.
A. I did all the work myself. I took that off of the timebook at the place, and I just signed and approved it myself, so I could check up on myself.
Q. Sometimes you showed the days worked.
A. Sometimes I did and sometimes I didn't.
Q. You put it in for Smith?
A. Yes.
Q. You didn't put it in for the rest?
A. No.

Mr. Van Siclen:
I now move that this document be stricken as being a self-serving document; he probably fixed it himself.

The Court:
The motion is overruled.

Mr. Van Siclen:
You deemed it only necessary to put in F. Smith for 3 days?

A. I only had myself to account for it.

Q. I show you Libelant's Exhibit No. 5 (handing Exhibit to witness) and ask you what that check is to Henry O'Barrio. Is that the payment for the barge?

A. That's the second and last payment for the barge.

Q. And is the first payment in there?

A. No; there was a first payment of $200 and a second of $1800, making $2,000, all told.

Q. You say the second payment is not in here?

A. I said the 2nd payment was there. The first payment was $200 to bind the bargain; a few days later I gave him the check, $1800.00.

Q. That would be this one on December 4, 1929, would it not?

A. Yes.

Q. That is marked "Barge payment"?

A. Yes.

Q. And the first one is marked Panama Sand, is it not?

A. All of them are marked that.

Q. Are they all marked "Panama Sand"?

235 A. Yes.

Q. And all signed by you?

A. All signed by me.

Q. And you signed for the Panama Sand Company?

A. Not Panama Sand Company; Panama Sand Account.

Q. Panama Sand Account?

A. That is not Panama Sand Company on that; that's Panama Sand, designating Panama Sand Account for the money advanced me by Dr. Reeder was drawn out on that account. I kept them separate.

Q. What would this one be for? (Indicating.)

A. I would be because I didn't have any money. I went down, I presume to the Collector of the Panama

Canal and he wrote the check out on a Chase National Bank check, and I couldn't see what it was, and it came back and the Chase National Bank were kind enough to telephone us what to do.

Q. What would that be for? (Indicating.)

A. Something I bought from The Panama Canal.

Q. In 1929?

A. Yes; in 1929. I think that must have been something about reinforcing for the concrete work on the barge; that is what I think it was.

Q. But you don't know?

A. You can verify that in the book.

Q. They are all "Panama Sand"?

A. All on the Panama Sand Account.

Q. At that time there was no such corporation or partnership or anything like Panama Sand Company that you were interested in?

A. No.

Q. You know you are under oath. You realize that?

A. Yes.

Q. I am going to ask you again: There was no Panama Sand Company on the 30th day of December 1929?

Mr. Carrington:

I object. Not proper cross-examination.

The Court:

Sustained.

Mr. Van Siclen:

The checks are signed by the Panama Sand, and he says he was the Panama Sand. I expect to show that there was a Panama Sand Company at that time and that he was a party to that.

236 The Court:

The objection is that it was not proper cros
examination, and nothing was touched upon at th
time at this examination.

Q. In explanation of Libelant's Exhibit No.
tell why barges No. 2 and 11 why the words "barge
are in plural.

A. I don't know; they do funny things in the Can

The Court:

They only charged one barge to you?

The Witness:

There was only one barge.

Q. You paid that bill?

A. I paid that bill.

Q. So if it was a bill for 2 barges, you paid fo
more than you should pay?

A. If it was a bill for 2 barges.

Q. Don't that show a bill for 2 barges?

A. Then it is a clerical error.

Q. That is a clerical error?

A. Yes; that's a clerical error; it was couple
in with some other bill they have there the sam
thing somewhere else. Here it is right here (indica
ing). You see the coupling of the pump number
the same on the barge it says there 2, but in Roma
numbers.

Q. It says "Barges No 2 and 11.".

A. It does not say that there, it says the othe
number.

Q. Are these typists given to running from on
kind of lettering to another?

A. I am not

Q. In the usual course of business they don't?

A. No.

Q. If they start out with Roman numbers they go on, which is yours of these bills? No. 11 or 2?

A. Both, because there never was but one barge over there.

Q. You want the Court to decide you are entitled to this money because they furnished something to two barges?

A. No; they furnished to one barge.

Q. But you admit that it was charged to two barges?

A. I admit it was charged to one barge, and there is a clerical error in there of some description or other.

Q. You would say that was the Roman number for 11?

A. It's a roamin' around there, alright.

(Witness excused.)

237 Mr. Carrington:

The Libelant rests.

Mr. Van Siclen:

At this time, may it please the Court, I move that the libel be dismissed. First, because there has been no damage proved whatever. Mr. Thomas R. Lombard, so far as the record shows, these is no proof of damage to Mr. Lombard, who has brought this libel, not even a scintilla of evidence. They have failed to prove that he was damaged and received no damage. We owe him none.

And secondly, we believe we have shown on the evidence, as leading up to the alleged collision that the person in charge of the boat was incompetent. He knew enough to sit there on the stand and his memory was bad, and he didn't know how wide the channel was; he didn't know about the tide; he didn't know any of the things; he was absolutely incompetent. No Court could find him competent.

For those two reasons: First, that no damage h
been proven none whatever; and second, that t
boat was navigated in charge of an incompetent pers
and in violation of the navigation rules of The Panam
Canal; as shown by the lights of the barge, etc., w
ask that the matter be dismissed.

The Court:

The motion is overruled on the 2nd ground: an
the Court reserves its ruling on the first ground.

The Court adjourned at 4:45 p. m.

238. United States District Court for the Cana
Zone, Balboa Division.

In Admiralty No. 1628.—Hearing (Continued).

Thomas R. Lombard, Libelant,

vs.

The Motor Ship Real, her engines, boats, boilers, tackl
apparel, furniture, etc., etc., and Hans Elliot
owner of said Motor Ship Real, Respondents.

Hans Elliot, Cross-Libelant,

vs.

The Motorvessel Lucky Girl, her engines, boats, tackl
apparel, furniture, etc., Cross-Respondent.

August 3, 1931.

Court met at 10:00 a. m.

Mr. Van Siclen:

Does the Court desire a statement of defendant's
position?

The Court:

If you care to make it.

Mr. Van Siclen:

At this time, if it please the Court, we propose, as respondent, to show conclusively that; in order that there may be a continuity of the record, first, that at the time of the collision and in so far as the damage heretofore attempted to be proved that then the Panama Sand Company was operating, as per the books which have heretofore been in evidence; that for some time prior to that they were doing business. Following that we shall put on our evidence showing the ownership of the Real and, as well, the movements of the Real up until the time of the collision, during the collision, and following the collision. Following that, we expect to show Your Honor the damages sustained by the Cross-Libelant.

DR. IGNACIO MOLINO was called as a witness for the respondents and Cross-Libelant, and being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):

Q. State your name.

A. Ignacio Molino, Jr.

Q. What is your profession or occupation?

A. I am a lawyer.

Q. Are you an accredited attorney in Panama?

A. Yes, sir.

239 Q. Did you, Doctor, at the request of Van Siclen & Boggs, on behalf of respondents and Hans Elliott, Cross Libelant, make a search of the records of the Notarial Offices in Panama for the evidence of formation of the company, known as the Panama Sand Company?

A. Yes, sir.

Q. And in pursuance of that search did you fi
there was such a company registered?

A. I found there was such a company registere
and I got the certificate from the Registration Burea
and from the Notary's office.

Q. (Handing witness paper.) I hand you respon
ent's Exhibit "B", which is a document in Spanis
authenticated by the American Consul, and a transl
tion into English, and ask you if that is the docume
to which you refer?

A. Yes, sir: this is the document I obtained.

Q. Does that document show the date upon whic
the Panama Sand Company was organized?

A. This document states how the Panama San
Company was organized and all concerning the Panam
Sand Company.

Q. When does it state the Panama Sand Compan
was organized?

Mr. Carrington:

I object. The document speaks for itself.

The Court:

Sustained.

Q. Will you read from the document when th
Panama Sand Company was organized?

Mr. Carrington:

I object, if Your Honor please. The document i
not yet in evidence.

The Court:

Sustained.

Mr. Van Siclen:

I now offer in evidence the notarial record of the
incorporation of the Panama Sand Company, properly
authenticated certificated.

Mr. Carrington:

This is a pretty long document, and I won't take the time of the Court more than necessary, but the Respondents' Exhibit "E" is objected to on the grounds that the Panama Sand Company does not form part of the issues of this case, and the exhibit is, therefore, incompetent, irrelevant, and immaterial. The organization of the Panama Sand Company is absolutely disconnected from this case. The pleadings here show and admit the ownership of the barge and that is all that is before the Court; not the Panama Sand Company.

240 Mr. Van Siclen:

If the Court please, we spent more than one full Court day endeavoring to show by whom the damages we are trying to prove were incurred. This Court admonished Proctors to bring into Court and show to whom these books belonged and who was doing this business. Then they brought into this Court men of heretofore unimpeachable character to state that the Panama Sand Company was not organized before September, 1930; that by the greatest stretch of the imagination, one witness put it, they couldn't have been organized. Now, I feel that we have a right to discredit those witnesses placed on the stand to show that there was a Panama Sand Company, but that the Panama Sand Company was not in existence prior to September, 1930, and we are now really doing what the Court requested Proctors to do on Saturday and had no opportunity to do heretofore. The evidence was in the hands of the opposite party and they didn't care to produce it. We now, again, offer Exhibit "B" in evidence. We ask for a ruling as to the admission of this document.

Mr. Carrington:

The statement of counsel is not altogether correct that these witnesses testified that this company was

not organized until September, 1930; they testified it was not operating; there was no perfect organization; but, regardless of that, it is not a part of the issues in this case. Those 2 witnesses that counsel went out of the record to examine in order to examine on other extraneous matters only testified that they had no interest in the boat—the barge—that was sunk, showing they could not possibly recover or come into Court and ask for any relief for damages to the boat. The boat, so far as they knew, belonged to another, Thomas Lombard, and so to start out and open a big avenue of the Panama Sand Company, which is not before the Court and not an issue, is straying far away from the record.

The Court:

It is perfectly true that the libel asserted that the barge belonged to Thomas R. Lombard, and it is perfectly true that respondents' reply admitted that. It is also true, however, that when it came to proving the damages in the case the books which were offered had something about a Panama Sand Company, and, as Libelant had a right to do, he attempted to explain just how it came about that the books were marked Panama Sand, and the checks were marked Panama Sand, and all that sort of thing. Now, evidence in rebuttal will be competent evidence, if there is any. On that ground, the objection is overruled.

Mr. Carrington:

Exception noted.

241 Q. I ask you, having Respondent's Exhibit "B", if that Exhibit will show when the Panama Sand Company was oragnized?

A. It does.

Q. When was it organized?

A. On the 12th day of December, 1929.

Q. Does that document show who were the organizers of that company?

A. It does; it says Dennis Frank Reeder, Thomas Lombard and Albert O'Barrio.

Q. Does it give the occupation of the organizers?

A. It says the officers of the company are at present, President, Treasurer and Secretary, and it says that Dennis Frank Reeder is President, Thomas Lombard, Treasurer-Secretary.

Q. And it says that the company was organized in December, 1929?

A. 12th of December, 1929.

Q. By Dr. Reeder and Thomas Lombard?

A. And Albert O'Barrio.

Q. Did you further search, on the request of the office of Van Siclen and Boggs, on behalf of the respondents, and learn whether or not the company was thereafter registered?

A. Yes, sir; I did. I found the company was duly registered.

Q. Do you recall the date upon which it was registered?

A. No; I don't.

(Witness excused.)

C. M. LUPFER was called as a witness for the respondents and Cross-Libelant, and being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):

Q. How are you employed?

A. Assistant Chief Clerk, The Panama Canal.

Q. What are your duties?

A. I am in charge of records, among other things.

Q. Panama Canal records?

A. Yes.

Q. You are here by reason of a subpoena duces tecum?

A. Yes, sir.

Q. And that required you to bring in certain correspondence, did it?

A. Yes, sir.

242 Q. And that correspondence was had between The Panama Canal and the Panama Sand Company and or Thomas Lombard?

A. Yes, sir.

Q. And did you bring that record in?

A. Yes.

Q. Did the Panama Sand Company negotiate for a lease of land in the Canal Zone?

A. Yes, sir.

Mr. Carrington:

I object to that. I move that the answer be stricken, because Counsel hadn't time to object. If there is a record in here about a negotiation, the record should be produced in evidence, unless the negotiation was made personally with the witness.

Mr. Van Siclen:

On Saturday witness gave testimony here that there was no such thing as the Panama Sand Company, prior to a certain time. My good colleague here now says that they testified that they hadn't done business prior to a certain time. I expect to show that they did business.

The Court:

This objection goes to the proposition that the correspondence is the best evidence, if there is any. The objection is sustained.

Q. Mr. Lupfer, is there a letter or communication of the Panama Sand Company dated April 2, 1931, in that record?

A. Yes, sir.

Q. How was that letter signed?

Mr. Carrington:

The letter will speak for itself, who signed it and how it was signed. I object.

The Court:

Sustained.

Mr. Van Siclen:

These matters that we have before us now are public records and should, necessarily, remain in the archives of the Record Bureau. To take them from the files and place them in evidence and in the custody of the Court somewhat interrupts public business, because they are public records, and one searching the public records expects to find the entire record. I cannot see why the letter referred to cannot be read into the record, and I ask that it be read into the record.

The Court:

That does not relieve Counsel from offering it. It may be a fact that you will have to substitute a copy, but the same rules apply to public records as
243 to any other.

Q. I now hand you Respondent's Exhibit "C" and ask you what that is, if you know.

A. It is a letter from the Panama Sand Company, Incorporated, signed by Thomas Lombard—

Mr. Carrington:

That's exactly what Counsel is after, and I am objecting to—reading into the record something that is not yet before the Court.

The Court:
Simply state what it is.

The Witness:
A letter.

Q. A letter from the Panama Sand Company?
A. Yes; it is a letter from the Panama Sand Company.

Mr. Van Siclen:
I now offer Respondents' Exhibit "C" in evidence.

Mr. Carrington:
This Respondent's Exhibit "C" is objected to as being immaterial, incompetent and irrelevant. It has nothing to do with the issues in this case does not form any part of the issues.

The Court:
For what purpose is it offered?

Mr. Van Siclen:
It is an endeavor to show that the Panama Sand Company, by its agent, or some other officer, Thomas Lombard, was doing business at a certain time, which they have heretofore denied and took up a day of this Court's time and our time in order to make a denial.

The Court:
Is that the purpose for which it is offered?

Mr. Van Siclen:
Yes, sir; to show that it was doing business prior to September, that they testified to it was not.

The Court:
The objection is overruled. Let it be admitted for that purpose only.

Mr. Carrington:
I except.

Q. Showing you Respondents' Exhibit "C," by whom was that communication signed?

A. Panama Sand Company, Incorporated, by Thomas R. Lombard, Secretary.

Q. What is the date of that communication?

A. April 2, 1930.

Q. In the record you have brought, is there a letter of the Panama Sand Company dated May 22, 1930?

A. Yes, sir.

Q. I hand you Respondents' Exhibit "D" and ask you if you know what that is.

A. Yes, sir.

244 Q. What is it?

A. It is a letter from the Panama Sand Company.

Mr. Van Siclen:
I now offer in evidence Respondents' Exhibit "D."

Mr. Carrington:
I object to it as immaterial, incompetent and irrelevant.

Mr. Van Siclen:
It is offered for the same reason as stated by me in connection with Exhibit "C."

The Court:
The objection is overruled. Let it be admitted.

Mr. Carrington:
Exception.

Q. I hand you Respondents' Exhibit "D" and as you by whom that communication is signed.

Mr. Carrington:
Objected to. The exhibit speaks for itself.

The Court:
Objection overruled. It is in evidence; he may state.

A. It is signed by the Panama Sand Company, Incorporated, Thomas R. Lombard.
Q. And when was that communication dated?
A. May 22, 1930.
Q. To whom is it addressed?
A. H. Burgess, Governor of The Panama Canal

(Witness excused.)

Mr. Van Siclen:
If the Court please, it has been stipulated between Proctors that there may be substituted, later on, a copy of the exhibits just offered (referring to Respondents' Exhibits "C" and "D").

The Court:
Let the record show that copies are to be made of these two exhibits and that they shall be substituted for the originals in evidence, on agreement of the parties.

Mr. Carrington:
At this time, if the Court please, I move that both these Exhibits be stricken from the record as incompetent, irrelevant, and immaterial, and as not tending to prove any part of the issues in the case.

The Court:
Objection overruled.

Mr. Carrington:
Exception.

Mr. Van Siclen:
In view of the state of the record of the testimony in this Court, as your Honor must recall, as we worked on it Friday and Saturday the whole of Saturday afternoon the Court endeavoring to have Proctors for Libelant show who and what this Panama Sand Corperation was and when it was organized, in view of the testimony of the witnesses it must be remembered, because it was very definite, that there was no such thing as the Panama Sand Corporation prior to sometime in September, as one witness put it.
245 He was not sure but he thought it was somewhere between the middle of September and the last of September.

Mr. Carrington:
I want to find out what Counsel is doing. Is he arguing the case, or

Mr. Van Siclen:
I will make a motion. I move again that the libel be dismissed.

Mr. Carrington:
I would like to know of Counsel if he has put his evidence in. He cannot move to dismiss until one or the other party, or both, have rested. The motion is out of order altogether.

The Court:
The motion is overruled.

HANS ELLIOT was called as a witness for the Respondents and Cross-Libelant, and after being duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):

Q. State your name.

A. Hans Elliot.

Q. Of what country are you a citizen?

A. Sweden.

Q. Are you engaged in business in the Republic of Panama and the Canal Zone?

A. Yes, sir.

Q. And, in the course of that business, do you have certain vessels operating?

A. Yes, sir.

Q. And do you have a vessel named the Real?

A. Yes, sir.

Q. Are you the owner of the Motor Vessel Real?

A. Yes, sir.

Q. Were you the owner of the Motor Vessel Real on July 31, 1930?

A. Yes, sir.

Q. On that date did the Motor Vessel Real have a collision with a barge?

A. Yes, sir.

Q. (Handing blue print to witness.) I hand you herewith Respondents' Exhibit "F" and ask you if you know what that is.

A. It is a blue print of the Motor Vessel Real.

Q. Does that show exactly how the Motor Vessel Real was on the 31st day of July, 1930?

246 A. Yes, sir.

Mr. Carrington:

That question is objected to as incompetent. The exhibit is not before the Court. I move that the answer be stricken.

The Court:

Sustained.

Mr. Van Siclen:
We offer Respondents' Exhibit "E" in evidence.

Mr. Carrington:
I would like to ask the witness a few preliminary questions.

The Court:
Go ahead.

Mr. Carrington:
When was this Exhibit "E" made?

The Witness:
It was made in Sweden in 1928, when I was over there and bought the Real.

Mr. Carrington:
No objections.

The Court:
Let it be admitted.

Q. Showing you Respondents' Exhibit "E," I ask you if that is a correct drawing of the Motor Vessel Real, as she was on the date of July 31, 1930.

A. Yes, sir; with the exception she did not have a sail.

Q. It did not have a sail?

A. No.

Q. I ask you what this represents (indicating on Exhibit "E")?

A. That is the pilothouse.

Q. What end of the vessel is this (indicating on Exhibit "E")?

A. The stern.

Q. And what end of the vessel is that (indicating on Exhibit "E")?

A. Forward.

Q. And what is this (indicating on Exhibit "E")?
A. The engine room.
Q. Is the Pilot House astern of the engine room?
A. Yes, sir.
Q. What is the distance from the Pilot House to the stern of the vessel, approximately?
A. Approximately 10 feet.
Q. And what is the distance from the pilot house to the stem of the vessel?
A. About 52 feet.
Q. Do you know, of your own knowledge, whether or not the Motor Vessel Real left the Port of Balboa on the morning of July 31, 1930?
A. Yes, sir; she left.
Q. Prior to her leaving the Port of Balboa
247 did you endeavor to have her equipped and made seaworthy in every respect?
A. She was seaworthy in every respect.
Q. Who was the Master of the Real at that time?
A. A man named Ekstrand.
Q. Did you furnish the vessel with a sufficient crew?
A. Yes, sir.

Mr. Van Siclen:
If the Court please, at this time I propose to turn the witness over to the Proctor for the Libelant, and later on, in its regular course, recall the witness to prove the damage, according to the procedure followed previously in this case.

The Court:
Very well.

Cross Examination.

(Questions by Mr. Carrington):
Q. You say you know, of your own knowledge, that the Real left the harbor of Balboa on July 31, 1930?
A. Yes, sir.

Q. Were you present?
A. No, sir.
Q. What kind of cargo did she have?
A. She was loaded with general cargo.
Q. How many hatches has the Real?
A. Only one, sir.
Q. One? She was overloaded, was she not?
A. No, sir.
Q. How much cargo did you have?
A. She had about 40 or 42 tons.
Q. What is her capacity?
A. 55, sir.
Q. Of course, you didnt see her when she left?
A. No; but I was down there when she finished loading at night.
Q. And where is the cargo space?
A. In the hold.
Q. What part of the ship?
A. From the engine room forward to the fore bulkhead.
Q. I show you Respondents' Exhibit "E." Will you please point out to the Court where the cargo
248 space of the Real is located?
A. It is here (indicating.) The cargo hold is here.
Q. What does the word "Lastra" mean?
A. Cargo hold.
Q. And what is the width or the length of this cargo hold? What is the length of it?
A. About 30 feet.
Q. Did you state to the Court a while ago that from the stern to the pilot house—I think you said it was 10 feet?
A. About 10 feet.
Q. How far is it from the pilot house to the beginning of the hatch? Give it appfoximately.
A. I think about 16 feet. From here to here (indicating) is 10 feet.

Q. It is about 15 feet from the pilot house to th partition wall of the hatch?

A. Yes; approximately.

Q. In that 15 feet you get your engine?

A. Yes, sir.

Q. What kind of engines have you got?

A. Baldwin locomotive.

Q. Of course, this boat, the Real, with her engines and boiler up aft, is just like all boats; when she is light the bow comes right up?

A. Of course, the bow is higher when she is light than when she is loaded.

Q. Absolutely; and if the schooner is down forward by the head she won't steer properly?

A. This boat has always steered good.

Q. Whether overloaded by the stern or head she steers good?

A. I cannot tell you, because we have never had her overloaded.

Q. And her machines were all right, were they not?

A. Yes, sir.

Q. How long does it take her to reverse her engines?

A. I think, maximum I have never noticed it actually but I think about half a minute.

Q. Half a minute?

A. I think so.

249 Q. Have you operated it?

A. No, sir.

Q. Has it got a clutch?

A. Yes.

Q. And is it necessary, in order to reverse the Real, full speed ahead to full speed astern, that you have to throw your clutch out?

Mr. Van Siclen:

The witness said he never operated the boat, and he wouldn't know.

The Court:

He knows the boat. He may answer.

A. Yes; there is an automatic there to throw the iron bar over and then you throw in the clutch and she goes astern.

Q. And so, if this boat was running full speed ahead and imminent danger appeared before the Master of the boat, he could stop that boat and reverse her put her in full speed astern in half a minute?

A. I think in about half a minute.

Q. Was the clutch of the Real in good order on the 31st of July, 1930?

A. Absolutely, sir.

Q. It was in good order, and her steering gear was in good order?

A. Absolutely.

Q. Answered the helm immediately as she was called on?

A. So far as a ship of her size can come over.

Q. A small boat swings faster than a heavy boat, does it?

A. Yes.

Q. Did I understand you to say that she answered the helm quickly and swings quickly?

A. Yes, sir; we have never had any trouble with the steering of her and we have gone up in very narrow water where practically no other boats can go.

Q. And she swings to the left or right very quickly?

A. Yes, sir.

Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. You stated that the vessel could be put from full ahead to stop and the engines go astern in half a

minute. Did you mean to say that in half a minute you could get sternway on the vessel, or that the engines would go astern?

250 Mr. Carrington:

Objected to as leading.

The Court:

Sustained.

Q When you say that the vessel's engines could be stopped and put astern in a half minute, what do you mean?

A You never stop the engine. If you call it 1 10th of a second to reverse for a stop, yes, but there is an iron bar that you throw from ahead to astern, and you slow her down a little, and throw the bar over and she is astern.

Q Would the vessel be going astern in the water immediately the engines were put astern?

A No, sir; that depends on the speed.

(Witness excused.)

ARVID EKSTRAND, was called as a witness on behalf of the Respondents and Cross-Libelant, and being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Sicklen):

Q State your name.

A Arvid Ekstrand.

Q How were you employed during the entire month of July, 1930?

A I was operator on the motor launch Real.

Q You had full charge of the Motor Vessel Real?

A Yes, sir.

Q. Like the Master of a ship?

A. Yes.

Q. And how were you employed on the morning of July 31, 1930?

A. I was operating the Motor Launch Real on the 31st of July.

Q. Did you leave the Port of Balboa with the Motor Vessel Real on the 31st of July?

A. Yes, sir.

Q. At what time did you leave the Port of Balboa?

A. I left Balboa at 2:30 in the morning.

Q. You left at 2:30 in the morning?

A. Yes, sir.

Mr. Van Siclen:

I wish to offer in evidence Exhibit "A" of Respondents, made a part of a deposition of Mr. Magee taken here last Friday.

Mr. Carrington:

No objection.

The Court:

Let it be received.

251 Q. When you left the Port of Balboa where were you bound?

A. Agua Dulce.

Q. Is that a port?

A. Yes; in the Republic of Panama.

Q. (Handing witness Exhibit "A".) I show you Respondents' Exhibit "A" and ask you to show the Court, in your own way, and tell just what you did on the morning of July 31, 1930, beginning with the time of leaving Dock 16, Balboa.

A. On the morning of July 31, 1930, I left Dock 16, bound for Agua Dulce. I went out in the basin pas Dock 6. About 150 feet off there was a dredge

laying right across, and I came out in the middle of the Canal and I told my wheelman to keep on his right side which he did, and passed the Oil Crib about 250 or 300 feet off, when I saw a light further down in the channel, about in the middle of the channel, so I told my wheelman to keep close to his side and keep her steady. As he continued the last buoy I saw was No. 13; it was about 50 feet off and then close up and when I had this meeting vessel so far down this incoming vessel closing up and when he was about 60 or 70 or 75 feet off, the other vessel turned to her starboard, trying to cross my bow. They made a turn to port to cross my bow. As soon as I saw that, I told me wheelman to put the wheel hard to port, and the engineer to reverse full speed astern, which he did as soon as possible, but it was too late to avoid a collision. I took a flash light and went forward to see what damage was done, and when I came forward I heard a man on the barge say the barge was sinking. I told them to throw him a line, which they did, one of my sailors; it was made fast and I towed them out of the channel, trying to save them.

Q. You say there was a dredge opposite Dock 6?

A. Yes, sir.

Q. You say you were in the middle of the channel when you were abreast of the oil dock?

A. I was about 250 or 300 feet off.

Q. Make a dot on Exhibit "A" where the oil crib is.

(Witness marked on Exhibit "A".)

Q. Draw a line out this way (indicating) from the dot you have marked.

(Witness drew line, as requested.)

Q. Mark the letter "B" at the end of that line.

252 (Witness did as requested.)

Q. Then, when your were in the position marked "B", did you see any other vessels to seaward of you?

A. I saw some lights farther out in the channel, on the port side, and I knew there was a vessel laying out there. I knew there was a vessel working there.

Q. Did you see any other vessel, other than the dredge?

A. When I was abreast the oil crib I saw a motor boat coming in.

Q. What was the position of this other boat with reference to your position at point marked "B"?

A. That boat was only about in the middle of the channel.

Q. What lights of the other vessel could you see?

A. The first I saw was the vessel's white lights.

Q. Did you ever see any other lights?

A. When it was coming closer up I saw the red light.

Q. And what did that mean to you seeing a red light?

A. That she was keeping over to her starboard side right hand side.

Q. Of what?

A. Of the channel.

Q. And did you then continue down the channel in the middle or near the middle of the channel?

Mr. Carrington:

Objected to as leading.

The Court:

It is leading, but he may answer. Proceed.

A. I told my wheelman to keep over close up to the buoys and keep her steady.

Q. Which buoys, left or right?

A. Right hand side.

Q. How close did you go to Buoy No. 15?

Mr. Carrington:
Objected to as not only leading but suggestive.

The Court:
Sustained.

Q. Did you pass Buoy No. 15?

Mr. Carrington:
Objected to. Let the witness state what he passed. He can tell us what buoys he passed; he knows what buoys he passed, instead of Counsel telling him.

The Court:
Yes: sustained. Proceed.

253 Q. Did your vessel and the vessel that you seen approaching you continue to approach each other, he showing you his red light?

A. Yes, sir.

Q. Could you see any other lights on him?

A. The white lights.

Q. Any other lights beside the red and white lights?

A. No: no other lights, sir.

Q. Did you thereafter come in collision with this same vessel on which you saw the red and white lights?

A. Yes, sir.

Q. Where did the collision take place?

A. Inside Buoy 9 Balboa side there is Buoy 9 (indicating on Exhibit "A") it took place over here (indicating on Exhibit "A").

Q. Make a dot at the place where you believe the collision occurred.

(Witness did as requested.)

Q. Mark that with the letter "C".

(Witness did as requested.)

Q. How far away from Buoy 11 did you pass?

A. I cannot see that buoy; it is night and there is no light on Buoy 11.

Q. You are acquainted with the waters of the Panama Canal are you of the harbor into Balboa?

A. Yes, sir.

Q. After you had passed the approximate position of Buoy No. 11, did you alter your course?

A. After I passed Buoy 11? I could not see that Buoy.

A. No; did you alter your course at any time after passing Buoy 15?

Mr. Carrington:

I object to that as being suggestive. The witness can state exactly what he passed.

Mr. Van Siclen:

He can say whether he did or not.

The Court:

Objection sustained.

Mr. Van Siclen:

Exception.

Q. When you were at Buoy 13 what was the position of the oncoming vessel?

A. In the middle of the channel.

Q. And what was your position in relation to Buoy 13?

A. I was about 50 feet off.

Q. Is Buoy 13 on the east or west side of the Canal?

254 Mr. Carrington:
Objected to as leading.

The Court:
Objection overruled.

A. The west side.
Q. And did you continue to aproach the oncoming vessel with her on your port side?

Mr. Carrington:
That is objected to.

The Court:
Sustained. It is leading and suggestive.

Mr. Van Siclen:
Exception.

Q. Did you at any time after passing the point marked "B" see the green light of the oncoming vessel?
A. No; I could never see it; I don't think. I saw some reflection but I couldn't see the light; that is, the green light.
Q. Did you ever learn the name of the oncoming vessel?
A. I knew after the collision; it was the Lucky Girl.
Q. When, if ever, did you see the green light of the Lucky Girl?
A. I never seen it.
Q. You never saw the green light of the Lucky Girl?
A. No.
Q. Did the Lucky Girl have any other vessel in tow?
A. Yes; she had a barge in tow.

Q. On which side of the Lucky Girl was the barge?

A. Starboard side.

Q. What did you say the Lucky Girl did just prior to the collision which you stated occurred?

A. When she was about 60 or 75 feet off, she, all of a sudden, made a turn to her starboard side, trying to cross my bow.

Q. She made a turn to her starboard side?

A. To her port side, I mean.

Q. Show the Court what you mean.

A. This is the oncoming ship (indicating), the Lucky Girl. She was about 60 or 75 feet off, and she made a turn like that (indicating).

Q. In what direction is that?

A. I don't understand what you mean.

Q. Did she turn east or west?

A. She turned west.

255 Q. And were you—was your vessel, the Real, in the channel at this time?

A. Yes, sir.

Mr. Carrington:

The question is objected to as leading.

The Court:

He may answer.

Q. Where was your vessel at the time you testified the Lucky Girl turned to the westward?

A. I was in the channel.

Q. How far from the prism line of the channel were you?

A. About 45 feet, more or less; I cannot tell exactly.

Q. Inside or outside?

A. Inside the channel.

Q. How long after the Lucky Girl made her turn toward the westward did your vessel, the Real, strike the Lucky Girl or its barge?

A. 10 or 15 seconds.

Q. What did you do or cause to be done when the Lucky Girl turned to the westward some 50 or 60 feet ahead of you?

A. I threw my wheel hard over to port and reversed my engines as soon as could be done.

Q. When you put your wheel to port, which way does your boat go?

A. To port.

Q. Which side, right or left, is the port side?

A. Left hand.

Q. Looking aft or looking forward?

A. Looking forward.

Q. And why did you do that?

A. Trying to avoid a collision.

Q. What else did you do?

A. I took my flash light and run forward on the boat.

Q. You don't understand me. You have stated that you put your helm to port. Did you do anything else?

A. I stopped the engine and reversed it and put full speed astern.

Q. And then, in 15 seconds, the collision occurred?

A. Yes.

Q. And then what did you do after the impact of the collision?

A. I took a flash light and went forward to see what damage had been done.

256 Q. I show you Respondents' Exhibit "E" and ask you if you know what it is. (Handing witness Respondent's Exhibit "E".)

A. Yes, sir.

Q. What is it?

A. A blue print of the Real.

Q. Where were you on board of the Real—where were you standing or sitting at the time of the impact with this barge that you are talking about.

A. I was standing right there (indicating on Exhibit "E").

Q. What is that? (Indicating on Exhibit "F").

A. It is the wheelhouse.

Q. And where was the flash light that you say you took?

A. It was standing right inside the door.

Q. And you took the flash light, and what did you do?

A. Run forward over here (Indicating on Exhibit "F".)

Q. Whereabouts?

A. Over to there (Indicating on Exhibit "F.")

Q. And did you then observe the damage that was done?

A. No, I heard the barge was about to sink so I told them to take a line, and went right away after the line.

Q. The sailor went after the line?

A. I did.

Q. Where did you go?

A. Inside the wheelhouse.

Q. And did you take a line from the Lucky Girl or its tow?

A. I took a line from the bow.

Q. Did you make it fast on the Real?

Mr. Carrington:

I will have to object to these continued leading questions.

The Court:

Yes; have him tell what he did. Sustained.

Q. Was there a line taken aboard; the line from the barge?

A. Yes; from the barge.

Q. And what was done with that line?

A. One of the sailors took care of it, and made it fast on the port side.

Q. Of the Real?
A. Yes.
Q. Where was the other end fast?
A. The other end was fast aboard the
257 barge.
Q. And then what did you do?
A. I went slow ahead until the line was tight and then full speed ahead out from the channel.
Q. In which direction?
A. West direction.
Q. Point out on the chart where you went.
A. In this direction (Indicating on Respondents' Exhibit "A").
Q. Why did you do that?
A. I knew there was shallow water there and I was trying to get her into shallow water.
Q. How long were you pulling on the barge?
A. Three minutes.
Q. Do you know whether or not the Lucky Girl assisted in pushing the barge while you were towing?

Mr. Carrington:
I object to the question as leading and suggestive.

The Court:
Objection overruled.

Mr. Carrington:
Exception.

(By direction of the Court, the Reporter then read the previous question.)

A. I don't know.
Q. Did the barge sink while you were towing it?
A. Yes, sir.
Q. After the sinking of the barge what did you do?
A. I let go the line and went alongside the Lucky Girl outside the channel.

Q. What more did you do?. Go to sleep?

A. And I asked the Captain what was the meaning of this, and he said he was on this side of the channel, on the left hand side. I asked why he didn't blow a signal. He said "I got a fog horn but it is out of commission." I asked him if he needed any more help and he said the boat was sunk and there was no more to be helped.

Q. And then what did you do?

A. I took my boat to sea; I would have come back if she was leaking, but she was not leaking, so I went to Agua Dulce.

Q. Have you any idea of the number of feet per minute you towed this barge, after getting this line on board of her?

A. I beg pardon.

258 (The Reporter then read the previous question.)

A. No, sir.

Q. How fast does the Real move over the ground at full speed?

Mr. Carrington:

Objected to as being too general.

The Court:

If he knows he may answer.

A. Between 5 and 5½ miles an hour.

Q. How far did you judge this red and white light to be when you first observed it—when you first saw it?

A. I think it was about a mile.

Q. Was there a lookout stationed on the Real?

A. I had a man forward.

Q. Who else was on deck, if anybody?
A. My wheelman and myself and a lookout.
Q. How much of a crew did you have on the Real?
A. We had 7, altogether, on board.
Q. What does your certificate call for—what number of men does your certificate call for?

Mr. Carrington:
Objected to; the certificate is the best evidence.

The Court:
Sustained.

Q. To the best of your knowledge, do you believe your engines to have been in good condition?

Mr. Carring on:
That is objected to. It is belief.

The Court:
Sustained.

Q. Were the engines of the Real in good condition?
A. Yes, sir.
Q. Was the Real, in all respects, seaworthy?
A. Yes, sir.
Q. What navigation lights did you have burning?
A. I have a motor boat license in the Canal Zone.
Q. What navigation lights did you have burning?
A. I had a white head light, red port light, and greeen starboard light, and a white light astern.
Q. Were these lights burning prior to the collision?
A. Yes, sir.
Q. Did you see the lights exhibited by the tow of the Lucky Girl?
A. No, I couldn't make them out; before the collision I saw some lights on the barge.

259 Q. What were they?

A. I saw a light forward on the barge.

Q. Was that the only light you saw?

A. Yes.

Q. Do you know what the course is in going out of Balboa channel?

A. South, 42 east.

Q. And coming in?

A. North, 42 west.

Q. How long have you been an operator of motor vessels?

A. For three years.

Q. Have you all of that time run in and out of Balboa channel?

A. Yes, sir; once or twice a week.

Q. Have you any other navigation certificates?

A. I have a Panamanian license.

Q. Before becoming an operator of a motor vessel what did you do for a living?

A. I was working with Captain Higston on board the Shiman, as mate.

Q. Is the Shiman a bigger vessel than the Real?

A. Yes, sir; 300 tons.

Q. And before that what did you do?

A. I was a sailor on Swedish ships.

Q. Big ships?

A. Well, not so big nor not small either.

Q. How long have you been connected with the water, altogether? How many years?

A. Almost 10 years.

Q. Are you acquainted with the local rules of navigation for the Panama Canal and its waters?

A. Yes, sir.

Q. What side of the channel do those rules require you to navigate on?

A. On the right hand side of the channel.

Mr. Van Siclen:

I find it hard to get in my evidence by reason of the exceeding dumbness of my witness, and I believe the rules should be modified when we have a witness such as this, so that we could lead a little.

The Court:

You could lead him if he was dumb; but he is not. He is a very intelligent witness.

Mr. Van Siclen:

Thanks.

Q. How is the Balboa channel lighted?

A. It has got red lights on the left hand side and white lights on the right hand side on the way going out.

Q. How did you know that you were in the channel and not outside the channel at the time of the collision.

A. I could see by the lights—the light buoys.

Cross Examination.

(Questions by Mr. Carrington):

Q. At what time did you say you left Balboa Harbor the morning of the 31st of July, 1930?

A. About 2:30 in the morning.

Q. At 2:00 o'clock?

A. At 2:30 in the morning.

Q. And when did you first get into the center of the channel and head seaward? About what time?

A. 10 minutes later.

Q. You would say about 2:40 you were off the oil crib?

A. Yes; beg your pardon, you mean when I came in the channel?

Q. When you were off the oil crib it was about 2:40, was it no?

A. No; it was later, nearly 3:00 o'clock, or 10 minutes to 3:00.

Q. It was 10 minutes to 3 when you got to the oil Crib?

A. Yes.

Q. And at that time you were in the center of the channel?

A. About in the center.

Q. And at that time you saw the red and white light of the Lucky Girl about a mile up the channel?

A. The first I saw was the white light.

Q. You saw only the white light?

A. I saw the white light first.

Q. At the time you saw the white light, did you see the green light or the red light, or both?

A. I saw only the white lights at first and after we had been going about 3 minutes more I
261 saw a red light.

Q. At the time you saw this white light on the Lucky Girl you did not see a green or red light?

A. No; I didn't see anything else at that time.

Q. Had the Lucky Girl got to Buoy 9 yet, from sea; had she reached Buoy 9 when you first saw her?

A. I couldn't tell.

Q. You couldn't tell?

A. No.

Q. Had she got to the dredge that you say you saw?

A. Yes; she passed the dredge, but I couldn't tell how far she was this side of the dredge, sir.

Q. She had passed the dredge and was in the center of the channel?

A. Yes.

Q. And then you continued, and you saw the red light, and she was still in the center of the channel?

A. Yes, sir.

Q. Now let's look at Respondents' Exhibit A. Point "B" is the oil crib, is it not?

A. (Looking at Respondents' Exhibit "A"). Yes.

Q. When you were at Point "B", where was the Lucky Girl?

A. I can not tell exactly, but I think she was down there. (Indicating on Exhibit "A".)

Q. Put it on the map with a pen. (By "map" referring to Exhibit "A".)

(Witness did as requested.)

Q. Draw a line and mark that "Z".

(Witness complied with request of counsel.)

Q. And where is Buoy 9 on that chart, Respondents' Exhibit "A"?

A. Here is Buoy 9 (Indicating on Exhibit "A.")

Q. We will mark that "Y". So when you saw the Lucky Girl she had not got to Buoy 9?

A. I couldn't tell where she was, but I think she was down there (indicating on Exhibit "A").

Q. How far was it from point "D" of Respondents' Exhibit "A" to Point "Z", where you first saw the Lucky Girl? Can you tell?

A. About a mile.

262 Q. Measure it.

(Witness complied with request of counsel.)

Q. How far is it from Point "B" to Point "Z" where you saw the Lucky Girl?

A. Nearly 2 miles (measuring on Exhibit "A"). One and three-quarters miles.

Q. And you say that the dredge was at Point "1" of Exhibit "A"?

A. Yes.

Q. Is it true that Point "C" is the place where the barge sank?

A. Yes.

Q. How far is it from Point "C" to Point "Z"?

A. A little more than a half mile.

Q. About how many yards? The Chart here tells you the yards.

A. 1,000 yards.

Q. And how fast was the Lucky Girl going?

A. I cannot tell how fast she was going.

Q. You know whether you had full speed ahead or not?

A. You asked me about the Lucky Girl.

Q. I mean the Real.

A. Between 5 and 5½ miles an hour.

Q. Between 5 and 5½ miles an hour?

A. Yes.

Q. And you kept up that speed of 5½ miles an hour until when?

A. Until I saw she was across my bow.

Q. What do you mean by "she"?

A. The Lucky Girl.

Q. You kept up that 5 miles an hour until you saw the Lucky Girl swing across your bow?

A. Yes, sir.

Q. When did the Lucky Girl leave the center of the channel and begin to bear down on you?

A. I cannot tell, because I saw the red lights only.

Q. The night was clear?

A. Yes.

Q. And the sea was calm?

A. Yes.

263 Q. And you say you saw this red light all the time and could not tell whether she was bearing down on you or not?

A. No; she was showing the red light and just as she was going over on the other side—

Q. You saw this red light about a mile and three-quarters away, did you not?

A. I could first see the white light only.

Q. Where was the Lucky Girl when you saw the red light?

A. She was in the middle of the channel.

Q. And how long after you saw the white light did you see the red light?

A. About three minutes after, I saw the red light.

Q. That indicated to you, that the Lucky Girl was going to the starboard side of the channel, did it not?

A. Yes, sir.

Q. And she kept going over to the starboard side of the channel and you kept coming over to the starboard side of the channel. Is that it?

A. I didn't know she was keeping over. I saw her red lights. She should do it.

Q. Do you know what the width of the Lucky Girl is?

A. How wide the Lucky Girl is?

Q. Yes; from one beam to the other.

A. I think she is about 15 feet wide.

Q. Fifty?

A. Fifteen.

Q. And do you mean to tell this Court that a mile and a half away you couldn't see 2 lights on a 15-foot boat?

A. I beg pardon. I don't understand the question.

Q. You said you saw only the white light of the Lucky Girl, and then continued 3 minutes after that, which would make it less than a mile and a half away, and you saw only the red light.

A. Yes, sir.

Q. Then could you not see, or can you not see, on boat 15 feet wide, 2 lights a mile and a half away? In other words, the Lucky Girl is coming in. She is about 15 feet wide; she is a mile and a half away

from you. If the Lucky Girl had a green light and a red light burning just 15 feet apart, opposite each other, could you not see both of those lights?

204 A. If she was heading right against me.

Q. She was heading to you; if she was meeting you, you would see both?

A. Both against both?

Q. If she was coming to your (to your bow) you would see both lights?

A. Yes.

Q. Then the Lucky Girl was not coming to your bow, but going away to the right hand side of the channel?

A. As shown by the lights.

Q. And that is the reason why you couldn't see the green light, because she was swinging toward the starboard side?

A. I know she had an awning over that light, besides.

Q. You never seen the green lights of the Lucky Girl?

A. No.

Q. Not even when you struck it?

A. Yes; right before then I saw the green light.

Q. And how far were you away from the apex of the channel?

A. You mean the middle, or the side?

Q. The middle.

A. At what time?

Q. When you put your vessel hard aport to swing away from hitting the Lucky Girl.

A. About 35 or 40 feet off.

Q. From the middle of the channel?

A. From the side of the channel.

Q. From the side of the channel?

A. Yes.

Q. And how far was the Lucky Girl from you at that time?

A. When she started to come across?

Q. Yes.

A. About 60 or 75 feet off.

Q. How far away to the left—your port side?

A. I think about 30 or 35 feet.

Q. 30 or 35 feet? How long had she been at that distance from you coming down the channel?

A. I could not tell if she was moving, or
265 anything.

Q. Did you see her with a tow at any time?

A. No; I could not make out any tow at first.

Q. You didn't know she had a tow until you struck her?

A. I knew she had a tow, because she was showing 2 white headlights.

Q. How far away did you see that?

A. A little after I first saw her I could make out 2 lights.

Q. A little after you first saw her. And at that time you knew the Lucky Girl had a tow?

A. Yes, sir.

Q. You knew she had a tow when you first saw the red light did you not?

A. Yes, sir.

Q. And you kept going to the right hand side of the channel going out?

A. I kept to my right hand side.

Q. You told the helmsman to go over all the time?

A. I told him when we went into the channel to keep to his right hand side, and when I saw the oncoming boat, the Lucky Girl, I told him to keep her close to the Buoy and keep her steady.

Q. The Lucky Girl was just about 35 feet from your port side when she swung over towards the channel that is towards the port side of the channel coming in. Is that correct?

A. About 35 feet off.

Q. And you were seeing her red light right up until that time?

A. Yes, sir.

Q. Don't you think you were too close to her?

A. Yes it was a little too close.

Q. Why didn't you blow your whistle?

A. Everything was going good and we had to keep the course; we would have gone clear of it.

Q. You understand the rules of the road?

A. Yes, sir.

Q. One of the Rules of the Road says that vessels meeting shall slow down until they have passed and cleared?

Mr. Van Siclen:

The rules of the road are a matter of law.

The Court:

He says he knows them. He may answer.

Mr. Van Siclen:

We have alleged the very rule you are speaking of as a Rule of the Road.

266 The Court:

Proceed.

(The Reporter read the previous question.)

A. Yes, sir.

Q. And the same rule of the road says you must give a tow plenty of room?

A. Yes, sir.

Q. Did you give her room?

A. If she had kept the course she would have cleared.

Q. You felt that you could sheer to her as close as possible, but she was to keep her direct road with a tow?

A. I wouldn't go out of the channel, because I knew it was shallow outside. I would not go outside to give her the whole channel herself.

Q. In other words, the Lucky Girl was squeezing you out of the channel. Is that it? Didn't you feel that way? That she was squeezing you out of the channel?

A. No; I didn't feel that way.

Q. Didn't you feel that

A. No; she had room to pass me.

Q. Didn't you feel she was too close to you?

A. She was too close to pass me.

Q. Why didn't you blow your whistle?

A. If she had kept her course

Q. You were running full speed ahead were you not?

A. Yes, sir.

(The Court then, at 12:00 noon, took a recess until 2:00 p. m.).

267 Ancon, C. Z. August 3, 1931.

Court reconvened at 2:00 o'clock, P. M., with Arvid Ekstrom on the stand.

Cross Examination (Continued.)

(Questions by Mr. Carrington):

The Reporter read the previous question and answer.

Q. And you kept that speed up until you struck the barge, didn't you?

A. As soon as I saw the barge start to cross my bow I shut down my engine and had it reversed.

Q. How far were you from the barge then?

A. I was about 60 or 75 feet off when the barge started to cross my bow.

Q. (Handing witness book). I hand you the Rules and Regulations Governing Navigation of the Panama Canal, with regard to vessels operating in the Panama Canal. I will ask you to read Rule 55 and tell the Court whether or not you observed that rule at the time.

(Witness then read said Rule as follows:)

Rule 55: Vessels Meeting in Canal. In the Canal, vessels meeting shall pass to the port side of each other, unless there be some special reason to the contrary and passing to starboard is authorized by the Canal pilots. When two vessels sight each other in a Canal Channel less than 800 feet wide they shall, when about a mile apart, reduce speed and proceed cautiously until they have passed and cleared.

Q. So you didn't reduce your speed, did you?

A. No, sir.

Q. Do you know the width of the channel?

A. Five hundred feet.

Q. Isn't that a narrow channel under the international and inland rules?

A. It is a narrow channel to a big vessel.

Q. That is your opinion, is it?

A. Yes.

Q. You stated a while ago that you stopped your engine and went astern about 60 or 75 feet before the barge was struck?

A. As soon as I saw the barge start across I started to reverse.

Q. How long after the red light on the Lucky Girl disappeared did the two vessels collide?

A. From the time the red light disappeared?

Q. From the time the red light disappeared how much time elapsed?

A. Some 10 or 15 seconds.

Q. And at that time you were about 35
.268 feet, lateral distance, from the Lucky Girl and about 75 feet in ..... distance?

A. I don't understand.

Q. At the time the red light of the Lucky Girl disappeared you were about 35 feet to the side of her and about 75 feet in front of her?

A. Yes, sir.

Q. And she swung around that barge and showed you her green light in about 15 seconds did she?

A. Yes, sir.

Q. Did you on the first day of August, in the Port Captain's Office at Balboa, in the presence of the Port Captain, Lieut. Byrholdt, Capt. Elliot, Mr. Lombard, and others, make a statement under oath of this accident?

Mr. Van Siclen:

Just a minute. What he may have said in the presence of these gentlemen is a matter of record and the record will show whether he did or not. I object to the form of the question.

The Court:

In what ground?

Mr. Van Siclen:

On the ground that it is irrelevant and immaterial, if not incompetent.

Mr. Carrington:

It is a rule of law of evidence—so well established that we need not question, that a witness can be impeached at any time by showing that he made statements different from the one that he is making at the

present time that he made a former statement of the occurrence different from the one that he is making at the present time; and, in order to do that, a foundation has to be laid. I have laid the foundation, and ask him whether or not he made a statement under oath.

Mr. Van Siclen:
That is a rule of.....if the Court please. He has not laid the foundation of that.

The Court:
He may answer. The objection is overruled.

Mr. Van Siclen:
Exception.

(The Reporter then read the previous question.)

A. Yes, sir.

Q. Was this question asked you at that time and place, and did you make the following answer: "When you saw there was danger of collision, did you stop or back your engine?

A. I stopped as soon as possible and backed it up. When I heard he was taking water I told him to give me a line and I would tow him to shallow water."

Mr. Van Siclen:
I object.

269 The Court:
Overruled.

Mr. Van Siclen:
Exception.

(The Reporter then read the previous question.)

A. Yes, sir.

Q. Were you asked this question and did you make the following answer:

"Q. Was this before the accident?
A. This was after the accident."

Mr. Van Siclen:
I object on the same grounds.

The Court:
Same ruling.

Mr. Van Siclen:
Exception.

A. Yes, sir.

Q. Was this question also asked you, and did you make the following answer: "Q. Then your engines were going full speed ahead when you hit the barge? A. Yes, sir. I did not have time to stop, as she came suddenly across my bow." Was that question asked you and did you make the answer as read?

Mr. Van Siclen:
I object, on the same grounds.

The Court:
Same ruling.

Mr. Van Siclen:
Exception.

A. He asked me that question but it is not as I said there.

Mr. Carrington:

The witness is only permitted to say yes or no.

The Court:

You have included both the questions and the answers in your questions. If you had just asked him if that question was asked him, and then asked him if he made that answer or if he had not made that answer he could have answered yes or no. The witness has the right to explain, under the circumstances.

A. The boat was going full speed; not the engine. That was put in there. That's two different things, the engine and the boat.

Q. Going on a little further: When did you say you first saw the tow of the Lucky Girl?

A. When I first saw it?

Q. Yes.

A. When I was up to the Oil Crib.

Q. On which side of the Lucky Girl did she have her tow?

A. I couldn't tell when I first saw her.

Q. You couldn't tell?

270 A. No; I saw only the white light at first.

Q. When you first saw the Lucky Girl you said you knew she had a tow?

A. I knew it was a towboat.

Q. That is not the question I asked. Did you know the Lucky Girl had a tow?

A. Yes; I knew she had a tow, she was showing towing lights.

Q. And on which side of the Lucky Girl was this tow?

A. I couldn't tell, because I couldn't see anything when I first saw her.

Q. Then the tow didn't have any lights?

A. I couldnt see any lights. I saw only 2 headlights on the towboat the first time.

Q. When did you first find out on which side she had the bow?

A. When she was crossing over I saw the red light. I couldn't see anything on that side—I knew she didn't have anything on that side—I couldn't see anything on the other side, because the lights were all mixed up.

Q. The lights in the channel were mixed up?

A. I could make out the 2 headlights when I first saw the Lucky Girl.

Q. Was the barge extending about 40 or 50 feet ahead of the bow of the Lucky Girl?

A. I don't know how many feet she was extending, but she was made fast to the starboard.

Q. The barge did project beyond the bow of the Lucky Girl, did it not?

A. I don't understand.

(The Reporter read the previous question.)

(No response.)

The Court:

He does not understand.

Q. The barge extended beyond the bow of the Lucky Girl?

A. What was that?

Q. Was the bow of the Lucky Girl in front of the barge, or was the barge in front of the bow of the Lucky Girl?

A. The bow of the barge was in front of the Lucky Girl.

Q. Did that barge have a light on it?

A. I could not see any light only just before the collision.

Q. The first time you saw the light was when she made the turn, 35 feet away?

A. Just a little bit before she crossed my bow.

Q. And was that the first time that you knew on which side of the Lucky Girl the barge was
271 tied? Was that the first time?

A. When I first seen the red light I knew she couldn't have any tow on that side and I thought she must have the barge on the starboard side.

Q. The light was clear, was it? It was not dark?

A. It was a clear night.

Q. And you couldn't see a big barge extending beyond the Lucky Girl coming up the channel?

A. It was at night; I couldn't see it.

Q. Was the channel lighter up? Were there lights in the channel?

A. Of course there were lights.

Q. Were there plenty of lights?

A. The buoy lights.

Q. And also the lights from the dredge?

A. Yes, sir.

Q. The dredge had plenty of lights?

A. Yes, sir.

Q. And the Lucky Girl was about passing the dredge when you first saw her?

A. I don't know where she was, but she was inside of the dredge towards Balboa.

Q. She was inside of the dredge towards Balboa?

A. Yes.

Q. In the center of the channel?

A. About the middle of the channel.

Q. And you stated that you knew she had a tow, but you didn't know on which side the tow was. Is that it?

A. I didn't know on what side it was. I thought the tow was on the starboard side, because we couldn't see anything by the red light on the port side.

Q. Did you see the Towboat Chagres in the channel?

A. No, sir; I didn't see anything else except the Lucky Girl and the dredge.

Q. How long after you first sighted the Lucky Girl did the collision take place? About how long?

A. I beg pardon.

(The Reporter then read the previous question.)

A. From the time I first saw the Lucky Girl?

Q. Yes.

272 A. I should say about 10 minutes, maybe more, maybe less; I cannot tell exactly.

Q. And you state now you did not see the Chagres or any other boat going out with another tow?

A. No, sir.

Q. And the channel was all lighted up and the dredge was lighted?

A. Yes, sir.

Q. The lights were bright and shining?

A. Yes, sir.

Q. So that you saw the red light of the Lucky Girl for about 7 minutes, approximately?

A. Yes, sir.

Q. How far inside did you say you were when you hit the Lucky Girl?

A. I beg pardon.

(The Reporter read the previous question).

A. I was about 35 feet inside the channel.

Q. And you were operating from one Buoy light to the other, were you?

A. Yes, sir.

Q. And you started to do that after you got to Buoy 13?

A. As soon as I was in the channel I went by the lights, but I told my wheelsman to come over to his right hand side.

Q. And when did you get straightened out after you left the center of the channel? At what point did you get straightened out?

A. Just as we passed Buoy 13.

Q. Right after you passed Buoy 13?

A. Yes.

Q. Do you know how far these buoys are, one from the other?

A. I cannot tell exactly; I think it is about a mile.

Q. One buoy is about a mile from the other. And from the time you passed Buoy 13 until the accident you were keeping in a straight line?

A. I was keeping in a straight line? Yes.

Q. And you saw the red light of the Lucky Girl keeping in a straight line, also? He was on the right side of the channel?

A. I cannot tell whether she was going to her right side. The side lights have to be screened to prevent the port light showing on the starboard side,

273 and the same way the green light.

Q. I don't understand the answer. Could you tell if the Lucky Girl was coming direct to you or going to the starboard side, since you were keeping on the starboard side?

A. She was coming against me, but I couldn't tell if she .

Q. Could you tell if she was bearing down on you?

A. No; if she was to do that I would see the green light.

Q. Then you stated she kept to the center of the channel until she got 75 feet away?

A. I said she was about the middle of the channel; I couldn't tell whether it was in the middle or more to one side or the other; it was about in the middle.

Q. You continued from Buoy 13 35 feet away from the edge of the channel?

A. Yes, sir.

Q. And the Lucky Girl came down about the middle of the channel until she got within 60 feet of you and then cut across?

A. Yes, sir.

Q. And then 10 seconds after he cut across you hit her?

A. Yes; 10 feet per second.

Q. So when your hit the barge you were swinging to port, were you not?

A. I put my wheel hard over to port as soon as I saw what was going to happen.

Q. You put your wheel hard over to port. Which side is that?

A. The left hand side.

Q. And did the bow swing to port, also?

A. Started to swing; she didn't swing enough to get clear.

Q. She didn't swing enough to get clear; but now I understood you to say that as soon as the Lucky Girl swung you put your helm to port and went full speed astern, did you not?

A. I reversed the engine and went full speed astern as soon as it could be done.

Q. As soon as it could be done?

A. Yes, sir.

Q. How long did that take to be done?

A. About 2 seconds.

Q. About 2 seconds; and in 2 seconds your engines were astern; your helm was swinging to
274 port—your helm was to starboard—and you were swinging to port?

A. Yes, sir.

Q. Don't you know, as a matter of fact, with a starboard helm going astern, you swung to starboard?

A. I beg your pardon. Please repeat the question.

(The Reporter read the previous question.)

A. With the rudder over to the right hand side you went over to the right hand—

Q. And to go to port you have to put your rudder to the right hand side?

A. No; I put it to the left hand side. I turn it the same way as I want to go to swing.

Q. I am talking about the tiller. You put the rudder over to the port side?

A. To the port side; yes.

Q. If you go astern how do you swing; with your rudder on the port side and you going astern on your engines, how would your boat swing?

A. When I am going astern she will swing to stern from the port side.

Q. Then your bow will go to the starboard side, wouldn't it?

A. Yes, sir.

Q. Absolutely. How, then, do you reconcile that with the statement that you were swinging to port on the port helm, and you were going full speed astern? Why was it the boat didn't swing to starboard?

A. I beg your pardon.

(The Reporter read the previous question.)

A. That would be foolish; I cannot explain it.

Q. I thought so.

A. When she goes to starboard she should stand over to the port side, sir. The stern don't come right away; it takes time before she comes up?

Q. Didn't you state that you were swinging to port?

A. I put my helm over to port.

Mr. Carrington:

I leave that to the Court.

Q. When did you start to load your cargo; the cargo you had on the night of the collision?

A. The afternoon of the day before the
275 collision happened.

Q. What time did you start?

A. I cannot tell exactly the time, but it was 5 o'clock or maybe 11; I cannot tell exactly—11 o'clock in the morning. I cannot tell exactly.

Q. Did you supervise the loading of the cargo?

A. Yes; I was there all the time.

Q. You were there until she was ready to go to sea?

A. Yes, sir.

Q. And prior to that you had made a trip back to Balboa?

A. Yes; I think so; the trip before.

Q. What time did you get into Balboa Harbor immediately before that trip? Did you get in the same morning, or the night that would be before that morning?

A. I got in in the morning, I think.

Q. That would be the morning of the 29th?

A. Of 30th. It happened the 31st.

Q. That would be the morning of the 30th?

A. Yes.

Q. What time did you get in that morning, if you recall?

A. I cannot remember.

Q. And the night before you came from Agua Dulce?

A. Yes. I cannot remember whether I came from there.

Q. Agua Dulce?

A. Yes.

Q. How long does it take to get from Agua Dulce to Balboa?

A. Fifteen hours.

Q. Fifteen hours?

A. Yes.

Q. Who was in charge of the boat from Agua Dulce to Balboa?

A. I was.

Q. You were at the wheel?

A. I was in charge of the boat.

Q. And from the time she left Agua Dulce until she got to Balboa were you on watch watching what was going on?

A. No; I was not on watch all the time.

270 Q. What were you doing?

A. When I am not on watch I am sleeping.

Q. You slept on the way up from Agua Dulce?

A. About 4 or 5 hours.

Q. From Agua Dulce?

A. On the way from Agua Dulce to Balboa.

Q. Who takes charge of the boat while you are asleep?

A. One of the sailors who goes as mate of the boat.

Q. Has this man a license to operate; to take charge of the boat?

A. He has not got a license.

Q. How long were you in charge of the Real?

A. How long was I in charge of the Real?

Q. Prior to the time of the accident.

A. About 2 years, or a year and a half.

Q. Did you say you have a license from The Panama Canal?

A. I beg pardon.

(The Reporter read the previous question.)

A. Yes, sir.

Q. How old was that license at the time of the accident at the time of the collision?

A. It was a little more than 2 years.

Q. After the collision did you return your boat to Balboa and make a report of the collision?

A. No, sir.

Q. Is it not provided in the rules and regulations of The Panama Canal that you must immediately return to port and report the accident?

A. I know it now, but I didn't know it that day.

Q. You didn't know it then?

A. Yes.

Q. And then you proceeded on to Agua Dulce with your cargo?

A. Yes, sir.

Q. Did anything happen on the way down?
A. Nothing happened.
Q. You discharged your cargo all right?
A. I had to return to Balboa the same
277 morning I got there.
Q. They sent for you?
A. Yes.
Q. Do you use a compass to steer by on your boat?
A. Beg pardon.
Q. Do you use a compass to steer by on your boat?
A. Yes, sir.
Q. What was your course at the time you collided with the barge?
A. I was not steering by compass at that time. I was keeping by the lights in the channel.
Q. That is you were traveling between the lights—light to light was that it?
A. Keeping inside the channel watching the buoy lights.
Q. How long does it take you to reverse the Real—the engines of the Real?
A. The engines?
Q. Yes.
A. It takes 2 seconds to reverse the engines.
Q. It takes 2 seconds to throw the clutch out and get it going in reverse?
A. To throw the clutch and get the engine reversing.
Q. You never did blow a whistle, did you?
A. No, sir.
Q. At the time you saw this Lucky Girl rather close you didn't blow a whistle?
A. No; because I kept on to my course.
Q. And you were determined you would keep your place with the Lucky Girl showing you her red light?
A. Beg pardon.
Q. You were determined to keep the Lucky Girl to your left, that was your intention—you to pass on the right was that it?
A. To get on my port side; yes.

Q. You were trying to bring her on your port side?
A. She was on my port side all the time.
Q. On the first of August, 1930, you were making a statement and testifying down at the Port Captain's Office in Balboa, which we were speaking about before. I will ask you if, at that time and place, this question was asked you: "Q. Then your engines were going full speed ahead when you hit the barge?" Was that question asked you?

278 Mr. Van Siclen:
I object to that question. The question has reference to when he was testifying somewhere else — what it might have been that he said down to the Port Captain's Office what he did say, or what he didn't say. I don't believe that we are concerned with anything that happened on August 1st, and certainly we are not concerned with what happened before another Board.

The Court:
Objection overruled.

Mr. Van Siclen:
Exception.

A. Yes; that question was asked. They asked me if the boat was going full speed ahead not the engines.
Q. Answer yes or no. Was that question asked you?
A. The boat was going full speed ahead but not the engine.

Mr. Van Siclen:
The man has a right to explain the move. I move that the last answer be stricken.

Q. Did you make this answer: "Yes, sir. I did not have time to stop, as she came suddenly across my bow."

A. No; I didn't have time to check the speed of my boat.

Q. Did you make that answer?

A. Yes.

Q. At the same place and at the same time before the same parties was this question asked you: "What type of clutch have you on the Real?"

Mr. Van Siclen:

If it please the Court, I must object to this question. It is immaterial, irrelevant, and incompetent. We are talking about some questions asked here and some questions asked there, and something about sometime at the Port Captain's Office on August 1st. I don't know whether this Court is concerned as to whether there was any testimony given there or not. In the first instance, there is no evidence here that there ever has been any testimony taken before. The witness did state he made a statement before Smith and Lombard and several more at a certain office, but as to there being any testimony, etc., there is nothing before this Court.

The Court:

Objection overruled.

Mr. Van Siclen:

Exception.

(The Reporter read the previous question.)

A. Yes; that was.

Q. And did you make this answer: "A. We have to reverse the engine."

279 Mr. Van Siclen:
Same objection.

The Court:
Same ruling.

Mr. Van Siclen:
Exception.

A. Yes, sir.

Q. At the same time, at the same place, before the same parties, did you make this statement to the Board: "Within about 30' or 40' he suddenly made a turn to the left hand or wrong side right across my bow." Did you say that?

A. I said 60 or 75, not 30 or 40.

Q. At the same time, the same place, and before the same parties, I will ask you if this question was put to you by Mr. Elliott: "Q. How far were you away from barge when you first saw the light?" Was that question asked you?

A. I can not remember.

Q. And did you make this answer: "A. When I first saw the light I was about 50 or 60 feet from her." Did you make that answer?

A. I made that answer.

Q. Will you tell the Court why you didn't blow a whistle when you saw the maneuver of the Lucky Girl, as you have stated?

A. Well, I kept my course and I didn't intend to change my course, and that's why I didn't blow.

Q. And you kept your speed, also; didn't you?

A. Yes, sir.

Q. So that in the face of danger you kept your course and speed, without giving the warning to the other parties there was danger imminent?

A. I didn't expect it to happen.

Q. I will ask you to indicate in the Court Room from where you are sitting, what your idea is of 3 feet.

A. From here over to that (indicating); the second pole.

Q. This one here (indicating).

A. Yes.

Q. From there to where you are is 35 feet?

A. About 35 feet.

Q. And you think that is a safe course to pursue with a barge being towed by a small towboat in the channel at flood tide?

A. I beg your pardon.

280 (The Reporter read the previous question.)

A. It was close, but if everybody had been keeping to the course it would have been all right.

Q. And you think it is pretty close?

A. Yes; it is close; but by keeping a straight course

Q. And it is also safe, in your opinion, to pursue that course full speed ahead on your engine. Is that correct?

A. I beg pardon.

(The Reporter read the previous question.)

A. Well, I don't see any danger if you keep to your course and the other fellow does the same thing.

Q. So that you leave it up to the other fellow to look out for himself and you look out for yourself in navigating the waters of the Panama Canal; is that it?

A. I am to keep my boat on my side and keep a steady course, and expect him to do the same not crossing the channel.

Q. And if he does not do the same you have no right to interfere?

A. I couldn't see him do anything like that; he was going good.

Q. Didn't that barge go down immediately after you struck her?

A. No, sir; it was at least 3 minutes after we had a tow line fast.

Q. Then you towed the barge and you towed the Lucky Girl?

A. I don't know if we towed the Lucky Girl; I was busy bringing the boat to shallow water.

Q. What happened to the Lucky Girl after that?

A. She was anchored about 25 or 30' from the barge.

Q. Where?

A. Outside the channel.

Q. Outside the channel?

A. Yes, sir.

Q. Did you tow the barge at right angles to the channel or did you tow it parallel to the channel?

A. At right angles.

Q. At right angles?

A. Yes, sir.

Q. How long was the tow line?

A. The tow line was 45 or 50 feet long.

281 Q. How long?

A. After we made it fast.

Q. And how long was the Lucky Girl?

A. I don't know how long the Lucky Girl is.

Q. How long is the Real?

A. She is 62'.

Q. 62'?

A. 62 feet, 2 inches.

Q. How far outside the channel did you tow the barge? Now Point "C" (indicating on Respondents' Exhibit "A") represents the place where the barge was sunk, or still lies sunk. How far outside the channel does the barge lie?

A. I think it is about 150 feet.

Q. And you were about 100 feet further out, were you not?

A. How do you mean?

Q. The barge is here at Point "C", (indicating) you say the tow line is about 45 feet long?

A. Yes, sir.

Q. And the Real is 60 feet long?

A. Yes, sir.

Q. That would be 107 feet, to be exact?

A. Yes, sir.

Q. If you towed the barge at right angles to the channel, and the barge is 130 feet from the edge of the channel, then you were—the Lucky Girl was 230 feet from the edge of the channel, wasn't she—I mean the Real?

A. 80 feet.

Q. Point "C" represents the place where the barge lies right now?

A. Yes, sir.

Q. And that is where you left the barge, is it not?

A. Yes, sir.

Q. And you say the barge is 130 feet from the edge of the channel?

A. About 150 feet.

Q. It is about 150 feet from the edge of the channel, at right angles to the channel. Is that correct?

A. Yes, sir.

Q. You towed the barge with a tow line
282 45 feet long, and the Real is 62 feet long?

A. Yes, sir.

Q. Therefore, the bow of the Real was 107 feet from the barge, was it not?

A. Yes, sir.

Q. And the barge was 150 feet from the channel, was it?

A. I don't know anything about 150 feet from the channel.

Q. Didn't you say it was approximately that?

A. When she sank; yes. She was 150 feet outside.

Q. You were about 257 feet from the edge of the channel with the Real, were you not?

A. I don't know exactly.

Q. How deep is the Real?

A. 5 feet 5 inches.

Q. Mark off 250 feet on the chart, from the edge of the channel.

(Witness indicated distance desired on the chart, Respondents' Exhibit "A".)

Q. This morning, in testifying on direct examination, I believe you stated that you did not go out of the channel because of shallow water. Is that correct?

A. What is that?

Q. This morning, in testifying on direct examination, I believe you stated that you did not go out of the channel because of shallow water.

A. Yes; I know there is shallow water outside.

Q. Then you went 250 feet outside after you sand the barge.

A. Yes; because I was trying to save the barge and I didn't think about anything else but to save her.

Q. Your boat answers the helm pretty quick, doesn't it?

A. Yes, sir.

Q. Just as soon as you put her to port she swings right over—begins to swing, doesn't she?

A. Yes, sir.

Q. I will ask you if, upon the said 1st day of August, 1930, in the Port Captain's Office in Balboa, before the parties mentioned in prior examination, whether or not this question was asked you at that time and place: "Q. About how long before vessels came together did you realize it was impossible to avoid an accident?" Was that question asked you?

283 Mr. Van Siclen:

I object to that as irrelevant, immaterial and incompetent. There is no testimony here about August 1st, and we are not interested in anything that happened.

The Court:

Objection overruled.

Mr. Van Siclen:

Exception.

A. I cannot remember that.

Q. And did you make this answer: "A. I was going nicely but if he had kept his course it would have been all right but when he went to the left hand side across my bow, I put wheel hard to port or left but it did not come in time—he was too close." Did you make that answer?

A. Yes, sir.

Q. Therefore, your boat was not swinging?

A. No; it was too close, and the engine was going astern, too.

Q. Why, then, did you state a while ago that your boat was swinging and answered the helm quickly?

A. Yes; she answered the helm quickly.

Q. You say now the boat was not swinging?

A. It started to swing; the first time she swing back to port.

Q. She swung the stern to port?

A. She was starting to swing with the starboard engine and then she came up with a stand to port.

Q. You mean you were swinging your stern to port?

A. Then she was swinging the stern to port.

Q. When I say "you" I mean the boat. The engine was swinging the stern of the boat to port?

A. Yes.

Q. And the bow was swinging to starboard?

A. Yes, sir.

Q. How long did she swing the stern to port and the bow to starboard before she hit?

A. I cannot tell; I didn't stay there with a watch in my hand.

Q. You have an idea about the time. 2 or 3 minutes?

A. A few seconds—10 or 15 seconds—I cannot know exactly.

Q. So this statement—this answer you made down in the Port Captain's Office is not correct? That the boat did not come in time—that's not correct?

A. No; she didn't come in time; if he had been further away I could have avoided it. I
284 didn't expect him to cross me.

Q. And this answer that you made in the Port Captain's Office on the first day of August: "Yes, sir. I did not have time to stop, as she came suddenly across my bow." That's not true; in answer to the question: "Then your engines were going full speed ahead when you hit the barge"; that part is not true; you didn't say that?

A. I may explain it to you.

Q. Do you mean that you told the Port Captain that when you made your answer?

The Court:

He may answer fully.

A. I remember that question; they asked me if the boat was going full speed ahead, but not the engine; they put "engine" on the paper. And, of course it was a short time and we couldn't check the speed of the boat, even if the engine was going full speed astern—at least, not much.

Q. The question was "Were you going full speed ahead" not astern.

A. If the boat was going full speed ahead.

Q. Then you mean to tell this Court that a boat can go full speed ahead and the engines going full speed astern?

A. Yes, sir; full speed ahead; I cannot tell exactly—it may be less.

Q. Then do you deny that this question was asked you at that time and place and before the same parties: "Q. Then your engines were going full speed ahead when you hit the barge?" Do you deny that question was asked you?

A. I don't know what you want to know. I have been explaining to you.

Q. I want to know if that question was asked you.

A. The question was asked me if the boat was going full speed ahead; it says on the paper the "engine." I remember the question. I said—I never said anything about the engine; all I said was about the boat.

The Court:

Counsel asks you if that particular question was asked you. If you think that particular question was asked you about the boat going ahead, then that question was not asked you, according to your way of looking at it.

(Reporter read the previous question.)

A. That question was asked me, except it was about the boat going ahead; not the engine.

The Court:

That is an answer. Proceed.

Q. You testified this morning that after the collision you went up to the Captain and asked him why he was on the left hand side of the channel and he said he always kept on the left hand side.

A. Yes; that's what he said.

285 Q. At first you saw him in the center of the channel and not on the left hand side?

A. I said I seen him about the middle; it was in the night and I couldn't tell exactly.

Q. He was not on the left hand side?

A. I could not tell. I saw him about the middle; he may have been over on the left hand side or on the right hand side; I saw him about in the middle.

Q. You don't know where he was?

A. He was about in the middle. I couldn't tell whether he was over to one side or to the other side; he was about in the middle; it is impossible to tell.

Q. And you were in the middle, also. Is that correct?

A. I was about in the middle that time when I first saw him.

Q. You saw only a white light for 3 minutes?

A. Only the white light.

Q. And you also saw several lights of the barge and the lights of the range lights, the buoy lights?

A. I saw the buoy lights and the vessels were out there on the left hand side of the channel.

Q. And you didn't see his red light until you got over to the left hand side of the channel?

A. Three minutes after I saw him first—saw the white light—I saw his red light.

Q. Where were you at that time; on the left hand side of the channel?

A. At that time I was on the right hand side.

Q. Near the buoys?

A. I cannot tell exactly. I think it was 60 or 70 feet off the buoys.

Q. And how far inside the channel did you say this collision took place? About 75 feet?

A. I think it was 75 feet inside the channel; maybe more, maybe less; I cannot tell.

Q. Did you swing your bow around in order to get a line to her?

A. Yes, sir.

Q. How long did it take to turn the boat around?

A. It didn't take long, because she swings from stern to port and the boat going ahead, too, so I was almost alongside when I wanted to take his tow line.

Q. About how many minutes would it take you to swing around?

A. If I did not swing too long it would take me 2 or 3 minutes to make the circle.

Q. Did you have to make a circle?

A. No, sir.

Q. You hit the barge and bounced?

A. Yes.

Q. Then what happened?

A. She was going ahead and the stern swung to port and I swung close up like this (indicating).

Q. You were going to put the bow of your boat where the stern was, and you were going to do that without turning around?

A. I don't get you.

Q. You say you didn't turn around, were you not swinging to the outside of the channel when you hit the barge?

A. I was not heading outside the channel then.

Q. Where were you heading?

A. I kept my course inside the channel.

Q. Didn't you state a while ago that when you were 75 feet from this barge, just as soon as you saw this barge attempt to cross your bow, you went full speed astern, and that the stern of your boat swung to port and the bow to starboard? Would that put you outside the channel?

A. No, it wouldn't put me outside the channel.

Q. I will ask you if, on the first of August, 1930, at the Por Captain's Office in Balboa, in the presence of the parties mentioned before, whether or not this question was asked you: "Q. If you are sure she

was inside the channel when you first saw her, how do you reconcile fact you implied a minute ago that after you hit her she was outside of the channel?" Was that question asked you?

A. I cannot remember.

Q. And did you make this answer to that question: "A. I did not say she was outside. The moment we hit her she was in line with the buoys." Did
287 you make that answer?

A. I cannot remember.

Q. But you do remember now that she was 75 feet inside the channel?

A. I don't know how many feet; she was inside the channel.

Q. As a matter of fact your memory is clearer now about the collision than it was on the morning of the first of August, 1930, is it not?

A. No; I wouldn't say that.

(A short recess was then taken, at 3:55 p. m.)

Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. Why was it not possible for you to see both the red and green lights when you were to one side of the approaching vessel?

Mr. Carrington:

I object. No question was asked the witness about the possibility of seeing a light; no question asked about a possibility.

Mr. Van Siclen:

The question was asked "Do you mean to say you can't see two lights?"

The Court:

Yes; I remember that. Objection overruled.

A. According to the Rules the light is screened so the red on the port side can't show the light over across the bow to the starboard side and when it is screened like that—if they are not screened they are not according to Rules.

Q. In what position must you be with reference to an approaching vessel to see both the red and the green lights?

A. If I get to see both red and green, I must meet him head on.

Q. Is there any difference in the rule between a sailing vessel and a large vessel, with reference to screening of its lights?

A. The Rules is all the same, big and small vessels.

Q. If when going ahead full speed, with the helm full left, hard aport as you call it, the engines are suddenly reversed, does the stern immediately start swinging to port?

A. Not immediately.

Q. What causes the stern to swing to port at any time, going to stern. What causes the stern to swing to port at any time at all?

A. What makes it swing?

Q. Yes.

288 A. It is the propeller, how it works, because when it goes astern the propeller goes from right to left and throws the water on the starboard side up against the boat—the stern of the boat—and that makes it swing.

Q. And does the Real start to swing before the headway is off of her?

A. Beg pardon.

(The Reporter read the previous question.)

Mr. Carrington:

I object. We want to know what happened on this night, whether she swung or not.

The Court:
Overruled. You can bring that out on cross-examination.

Mr. Carrington:
Exception noted.

(The Reporter read the previous question.)

A. If she started to swing to port right away?

(The Reporter read the previous question.)

A. Yes, sir; it starts to swing before the headway is off.

Q. Is it a rule that white lights—white navigation lights—of a vessel must show at a greater distance than the colored side lights?

A. Yes, sir.

Mr. Carrington:
I object. I am getting kind of suspicious why these questions are being asked in such a leading manner. I object because it is leading. The witness can state what the rule is, and not tell him what the rule is in asking him.

The Court:
Sustained.

Q. State, if you know, what the rule is with regard to the showing of navigation lights, the distance at which they must be seen.

A. The headlights must show 5 miles—be visible for 5 miles—and the red and green at least 2 miles.

Q. What is the color of the headlight?

A. White.

Q. What lights must a vessel towing another vessel alongside show, if you know? What is the rule, if you know?

A. She has to have at least 2 headlights, and if towing a barge alongside she has got to carry one light on the outside corner and one on the stern, outside corner.

Q. Any side lights?

A. A red and green.

Q. Do you recall the question of Dr. Carrington on cross-examination as to a license?

289 A. About a license?

Q. Yes.

A. What license? My operating license?

Q. When you answered Dr. Carrington that you had a license for a year and a half prior to the collision, what did you mean?

A. That was the time I got the license in the Canal Zone.

Q. Did you mean your operator's license, or the vessel's license?

Mr. Carrington:

The witness has stated what he meant, and Counsel has stated to him what he means.

The Court:

There being an objection, the objection is sustained.

Q. What would you expect the Lucky Girl to do if she desired to alter her course across your bow?

Mr. Carrington:

Objected to as incompetent, irrelevant and immaterial.

The Court:

Objection overruled.

Mr. Carrington:
Exception.

A. I would expect a signal.
Q. What signal would you expect in the situation which you described?
A. I would expect 2 sharp blasts.
Q. Had the Lucky Girl blown you 2 whistles—short blasts as you call them—in a situation as described by you on your cross-examination, would you then have blown an answering whistle?

Mr. Carrington:
That question is objected to as calling for a conclusion of the witness. If he had done so and so, would you have done so and so.

The Court:
It is a supposition.

Mr. Van Siclen:
They continually harped on the fact "Why did you not blow a whistle?" and he said he was on his own side going on and there was no occasion to blow a whistle.

Mr. Carrington:
I didn't ask "if", I asked "why." He is asking the witness for a conclusion that would be in the witness' mind.

The Court:
Objection is sustained.

Q. Had the Lucky Girl blown you 2 whistles, would you have answered?

Mr. Carrington:
Same objection.

The Court:
Sustained.

290 Re-Cross Examination.

(Questions by Mr. Carrington):

Q. You say that a vessel the size of the Lucky Girl and the length of the Lucky Girl, under the Rules of The Panama Canal—the navigation rules of The Panama Canal—must carry a bright headlight to be seen at a distance of 5 miles. Is that the navigation rules of The Panama Canal?

A. That is the rule for vessels.

Q. In China?

A. For vessels in any waters.

Q. I am talking about the Rules of The Panama Canal. Are you governed by these rules in navigating the Panama Canal?

A. Yes, sir.

Q. If there is a rule of The Panama Canal—a navigating rule—which requires the lights of a vessel of the size of the Lucky Girl to be seen 5 miles I would like you to state the Rule.

A. With a vessel like the Lucky Girl it is supposed to be 2 miles.

Q. It is supposed to be seen 2 miles?

A. Yes.

Q. Do you know the size of the Lucky Girl?

A. I think she is 40 or 45 feet.

Q. Accepting 45 feet as the size of the Lucky Girl, look at Rule 64 (handing witness book of rules and regulations); where does it state that the light must be seen 2 miles—the headlight.

(Witness searches in book.)

Q. Show the Court where the forward light must be seen 2 miles.

(Witness continues searching in book.)

Q. You don't find it. It is not in the Rules of The Panama Canal governing navigation of vessels?

A. No, sir; I can't find it.

Q. There is something you didn't find out until today in the Rules of Navigation of The Panama Canal. You stated a while ago if you were meeting bow to bow, you can see the green light, red light, and white light. Is that true?

A. Yes, sir.

Q. At the time when you first saw the Lucky Girl coming up she was about the middle of the channel, and you were about the middle of the channel. Is that true?

291 A. Yes, sir.

Q. You were meeting bow to bow? And you did not see either the green or red light?

A. No, sir.

Q. Is it not a rule of navigation—international rule as well as The Panama Canal Rule, that the unburdened boat must signal the burdened boat as to its intention?

A. I don't understand that question.

Mr. Van Siclen:

I don't believe he understands.

Q. Is it an international rule of navigation, as well as The Panama Canal Rule, that the boat that is free—has nothing attached to it—must signal the boat which is encumbered—which has something attached to it?

A. I don't know anything about a rule like that.

Q. Is it a Rule that the boat that is free—without any tow or otherwise—must give way to the boat that has something tied to it?

A. Is it a rule?

Q. Yes.

A. No.

Q. Didn't you know, on the first of August, 1930, that a boat without a tow must give way to the boat with a tow? Did you know that on the first of August, 1930?

A. No; I forget.

Q. What have you forgotten?

A. I cannot remember if I knew anything on that day.

Q. I will ask if, on the first day of August, 1930, in the Port Captain's Office, Balboa, in the presence of the parties named in your prior testimony, whether or not this question was asked you: "Q. Do you consider tow as having right of way over other boats?" Was that question asked you?

Mr. Van Siclen:

I object on the grounds that it is incompetent, irrelevant, and immaterial.

The Court:

Objection overruled.

Mr. Van Siclen:

Exception.

Q. Was that question asked you?

292 (The Reporter read the previous question.)

A. I cannot remember.

Q. And did you make this answer: "A. Yes, tow has right of way because they can't steer as other boats?"

Mr. Van Siclen:

I object, on the same grounds.

The Court:
Same ruling.

Mr. Van Siclen:
Exception.

A. I cannot remember if I answered that question.
Q. You state now you don't know whether a boat with a tow has the right of way over a boat without the tow.
A. She hasn't the right of way, but I give her the right of way.
Q. You do?
A. Yes.
Q. It is not according to the rules?
A. No.
Q. In other words, if you don't give the right of way, then the tow has to get out of your way. Is that it?
A. If I don't give the right of way?
Q. Then the tow must get out of your way.
A. I don't understand what you mean?

(The Reporter read the previous question.)

A. If I give the tow the signal that I am keeping on my course and if she answers with the same signal, I know it is all right. If she answers with another signal—a danger signal or anything like that—that she cannot come to the other side—I always give her the right of way.
Q. On July 31, 1930, you didn't give any signal that you were not keeping on your course, did you?
A. No; I didn't give any signal—I was keeping on my course—I was not changing my course, either.
Q. You didn't give any signal at all?
A. No, sir.

Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. You were not able to find any rule about the distance lights must show in the book Mr. Carrington showed you?

A. For vessels?

293 Q. Yes; for vessels.

A. I could not find it for small boats.

Q. Is there any rule? Did you find the rule?

A. No; I didn't find any.

Q. (Handing witness book) I show you the Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters and ask you if you can read English.

A. Yes.

Q. Then read into the record Rule 88.1.

Witness then read as follows:

Regulation 88.1. The preceding Rules and Regulations are in accordance with the International Rules of the Road; and when any conditions of navigation arise that are not covered herein, the International Rules of the Road shall apply.

Q. Now do you know the International Rule with regard to the showing of lights—navigation lights?

A. I beg your pardon.

(The Reporter read the previous question.)

A. Yes; I know for vessels.

Q. By the Rule, what lights must a steam vessel under way carry—by the International Rules?

A. She must carry a white headlight on the foremas and on the after mast another white light about 15 feet higher than the forward light, a red light on the port side and a green light on the starboard side.

Q. How far must these lights show?

A. The white lights must show 5 miles and the colored lights 2 miles.

Q. Which lights must show 2 miles?

A. The red and green.

Q. You don't know the meaning of the word "burdened", do you?

A. Beg your pardon.

Q. Do you know the meaning of the word "burdened"—(spells) b-u-r-d-e-n-e-d?

A. No, I don't know it.

Q. Do you know the rules with regard to vessels approaching one another so far on either side that they only see the red light of each other? Do you know that rule? What is that rule of procedure—navigation?

A. I don't understand the question.

294 Q. When two ships—2 vessels—are approaching one another in positions similar to that— red to red—do you know what the rule then is with regard to navigation?

A. To keep the course and speed, if they are not too close.

Q. And if they are in that situation?

A. The same thing.

Q. And if they are in that situation?

A. You have to blow one or two short whistles, according to where you want to go.

Q. If they blow one whistle what do they mean?

A. The first whistle gives to turn to starboard.

Q. And in that situation if one vessel shows its green light to the red light of the other vessel, what is the rule?

A. That's one blow—one short—and that one comes on to the other vessel (indicating).

Q. With vessels in that situation, which one has the right of way?

A. This one has the right of way (indicating).

Q. You mean in a situation where a vessel showing a green light to another vessel's red light, the vesse showing the red light has the right of way?

A. Yes, sir.

Re-Re-Cross Examination.

(Questions by Mr. Carrington):

Q. Is it not a fact that it is the rule of navigation that if two vessels are approaching each other from opposite directions and the movements of one vessel are uncertain, the vessel which is keeping steady on its course must blow 4 short whistles, indicating danger?

A. I don't understand the question.

The Court:

I will ask you to listen to the questions.

A. I don't understand English so good, sir.

The Court:

It is perfectly simple.

(The Reporter read the previous question.)

A. If it is dangerous to continue then we blow 4 short blasts.

Q. When do you expect to see the danger—after striking the other objects?

A. Of course I would expect it before. If I see there will be an accident or anything like
295 that.

Q. You do agree that's a rule of navigation, don't you?

A. If I see it happens—an accident—I do all I can to prevent it.

Mr. Carrington:
He answers the other Counsel's questions so correctly and don't answer mine.

The Court:
He answered correctly. The Court has to take the ordinary rules of answers.

Mr. Carrington:
Your Honor, I didn't hear him say "Yes." I didn't hear him.

The Court:
He said he must blow 4 short blasts. The difficulty is that every witness on the stand, instead of saying "yes" or "no" have to give their life's history. That happens with all witnesses who are not experienced and we have to take it. There is always an "if" or a "but" or "perhaps" and the Court is supposed to take all that into consideration.

Mr. Carrington:
That's correct; but I would like to know; if there is a "yes" in the answer I won't go any further.

The Court:
Yes, that's the answer. I recognize that you gentlemen want to take this to a higher Court.

(The Reporter read the previous question and answer.)

Mr. Carrington:
I asked him if it is a rule.

The Court:
And he said if he believed it dangerous to continue he would blow 4 short blasts; whether he states it as

a rule of navigation or not, we so interpret it. The Court so interprets it. Proceed. I realize you men want your record straight in another Court. Go ahead your own way.

Q. In navigating the waters of the Panama Canal, you act under the regulations governing The Panama Canal, don't you?

A. Yes.

Q. I will ask you to read Article 30 of the International Rules, as set forth in ..... for the record: (handing witness book).

Witness commenced reading hesitatingly, upon which Mr. Carrington took book and read as follows:

"Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to navigation of any harbor, river, or inland waters."

Q. Is Balboa Harbor an inland water?

A. What is that?

296 (The Reporter read the previous question.)

Mr. Van Siclen:

The question of whether a body of water is or is not inland water is a matter of conclusion, and it is not only a matter of assumption but it is a matter of law—the question of what is and what is not inland waters.

Mr. Carrington:

Counsel, the other day, stood in Court here and made that statement—that Balboa Harbor was a narrow channel within the International Rules or Inland Rules.

Mr. Van Sicleh:
Of the International Rules, if it please the Court.

Mr. Carrington:
And Inland Rules. He made that statement in Court. It is in the record.

The Court:
The witness may answer, if he knows. Do you know?

A. No; I cannot tell if it is inland waters.

Mr. Carrington the read Rule 88.1, which appears on page 176 of this record.

He also read Rule 88 as follows:

Rule 88. Masters to Take Precautions: Nothing in these regulations shall exonorate any vessel, or the owner, agent, master, officer or crew thereof, from all the consequences of a neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case; and in obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstance which may render a departure from the above Rules necessary in order to avoid immediate danger.

Q. Are you familiar with that Rule?
A. May I see it?
Q. Surely (handing book to witness).
A. It is Rule 89?

Mr. Carrington:
88.

Q. Does the Canal have this rule?
A. Yes; I am familiar with it.
Q. Is this the first time you have seen that Rule?
A. No; it is not the first time.

(Witness excused.)

Mr. F. H. Sheibley was then sworn as interpreter.

NARCISO NAVAS, was called as a witness for the Respondents and Cross Libelant, and having been first duly sworn testified (through the interpreter) as follows:

297 Direct Examination.

(Questions by Mr. Van Siclen):
Q. State your name.
A. Narciso Navas.
Q. How are you employed?
A. As a sailor.
Q. Were you a sailor on July 31, 1930?
A. Yes, sir.
Q. On what vessel were you on July 31, 1930?
A. The Steamer Real.
Q. Did the Real go to sea on July 31, 1930?
A. Yes, sir.
Q. What time did it leave Balboa?
A. I don't remember the hour.
Q. Were you awake when the Real left Balboa?
A. Yes, sir.
Q. What duty did you have on the Real, leaving Balboa?
A. My duty was to be in the bow of the Steamer to advise the Captain of any ships coming.
Q. Did you go to sea by way of Balboa Channel?
A. Yes; we left by way of Canal channel.

Q. After the Real arrived in Balboa Channel did you see any other vessel outside?

A. I did not see any other steamers.

Q. Did the Real have a collision with another vessel that morning?

A. Yes, sir.

Q. How long before the time of the collision did you see the vessel that you collided with?

A. About 10 minutes.

Q. What lights did you see first?

A. I saw 2 white lights and one red.

Q. What was the position of the Real with reference to the other vessel when you first saw the white light and red light?

A. This is the tug (indicating).

Q. And this is the Real (indicating)?

A. Yes, sir.

Q. And did you keep watching that white and red light coming towards you?

298 A. Yes, sir.

Q. Show what the vessels did and how they approached each other from the time of your first seeing the Lucky Girl until the time of the collision.

A. This is the way they went (indicating).

Q. Do you know whether the Lucky Girl blew a whistle before making the turn?

A. No, sir; I didn't hear anything.

Q. Just before the collision was the Lucky Girl inside of the channel?

Mr. Carrington:

That is objected to as leading.

The Court:

It is leading. Ask him to state where the boat was.

Q. Was the Lucky Girl inside or outside of the channel when you first saw her?

A. She was inside.

Q. And was the Real inside or outside of the channel?

A. Inside the channel.

Q. On which side of the channel was the Real?

A. On the right hand side.

Q. And which side of the center of the channel was the Lucky Girl?

A. She was coming on the left hand side—on the left hand side of the Real.

Q. And how far away from the Real was she when she made this turn to the left?

A. I don't remember.

Q. Was it 100 feet or 50 feet—judge by the length of the room.

A. From here to this end of the table—the long table (indicating).

Q. What did the Real do immediately following the impact of the collision?

A. I got the line and made it fast to that tow they had there.

Q. And did the Real then tow the barge or the Lucky Girl?

Mr. Carrington:

That question is objected to.

Mr. Van Siclen:

The objection is good. Strike the question.

Q. Was the Lucky Girl towing any other vessel?

A. Yes, sir; it had.

Q. What kind of a vessel?

A. That was a launch.

Q. And was it the launch that the Real struck?

A. Yes, sir.

Q. And was it the launch that the Real towed after the collision?

299 Mr. Carrington:
That is objected to as leading.

The Court:
I think the whole difficulty started with the misinterpretation of the word "machada." (Addressing Interpreter) Does that "machada" that you interpreted mean "launch"?

The Interpreter:
That's what he means by it, I think. That is a flat barge.

Mr. Carrington:
I objected to the question as being leading.

(The Reporter then read the previous question.)

The Court:
No; that's all right; he may answer.

Mr. Carrington:
Exception.

Mr. Van Siclen:
I object to the exception.

The Court:
Overruled.

A. Yes, sir.
Q. And where did it pull it to?
A. Outside of the channel.
Q. Did the barge sink?
A. Yes, sir.
Q. And after the barge sunk what did the Real do?
A. It remained near the tug and then the Captain of the Real got in conversation with the Tug.

Cross Examination.

(Questions by Mr. Carrington):

Q. When you first saw the Lucky Girl what part of the channel was she in—the left hand side?

A. On the left hand side of the Real.

Q. What part of the Canal? The center?

A. She was in the center.

Q. Where was the Real at that time?

A. She was in the center of the Canal, to the right.

Q. How close to the buoys?

A. I don't know the distance.

Q. Could you see the buoys from where you were on the bow of the Real?

A. Yes, sir.

Q. Were they far away from you or near to you?

A. They were far.

300 Q. When you saw the Lucky Girl coming up the channel, what did you say to the Captain, if anything?

A. I advised the Captain that a ship was coming.

Q. What did the Captain say?

A. He said he had seen it.

Q. What lights did you see on the Lucky Girl?

A. I seen the red light and 2 white lights.

Q. Did you see the lights of a dredge operating in the Canal?

A. Yes, sir.

Q. Which lights did you see first, the lights of the Lucky Girl or the lights of the dredge?

A. I seen the lights of the tug first.

Q. You mean the Lucky Girl?

A. Yes, sir.

Q. Had the Lucky Girl passed the dredge coming into Balboa Harbor at the time you saw her?

A. Yes, sir; she had passed the dredge.

Q. And she was at that time in the center of the channel?

A. Yes, sir.

Q. Then, when next did you talk to the Captain about the movements of the Lucky Girl?

A. I didn't speak to him any more.

Q. After you told the Captain that a boat was coming in did you go back down to the pilothouse where the Captain was?

A. I advised him and then I went to where I was on watch—there—my position.

Q. You said the Lucky Girl came right up in the center of the channel and the Real kept to the right hand side of the channel going out. Is that true?

A. Yes, sir.

Q. And just as the Lucky Girl got as near to the Real as from where you sit to this table (indicating) (about 12 feet) the Lucky Girl swung across the channel to the Real, did she not?

A. Yes; that's it.

Q. Did I understand you to say that the Real proceeded from Balboa Harbor along the right hand side of the channel going out?

301 A. Yes, sir.

Q. And then the Lucky Girl came down the center of the channel?

A. Yes, sir.

Q. And just as the Lucky Girl got about 12 feet from the Real she struck across like that (indicating)?

A. Yes, sir.

Q. How much distance was there from the bow of the Real, running at a right angle so as to meet the bow of the Lucky Girl at the time the Lucky Girl turned?

(Witness indicated the distance.)

Q. Indicate in the Court room.

(Witness indicated from where he sat to the edge of the carpet—about 10 feet).

Q. So that the Lucky Girl came from the center and came down towards the Real to about 12 feet on the left hand side of the Real at the time she made the turn?

A. Yes; that's correct.

Q. And the Lucky Girl did not show any green light? You never saw the green light?

A. No, sir; only the red light.

Q. And when the Real hit the Lucky Girl the Lucky Girl still showed the red light? Was that it?

A. When the collision occurred I saw the green light.

Q. When the collision occurred how far from the edge of the channel were the 2 boats?

A. I don't know the distance.

Q. Couldn't you see the lights going out on the right of the channel?

A. Yes; I could see the lights, but I couldn't calculate the distance.

Q. Did the Lucky Girl blow any whistle?

A. No; I didn't hear anything.

Q. The Real blew a whistle, didn't she?

A. Yes.

Q. How many times did the Real blow?

A. Twice.

Q. How long before the Real hit the
302 Lucky Girl did she blow?

A. I only just advised the Captain when she blew.

Q. At the time you told the Captain there was another boat in sight coming down, the Captain blew 2 whistles, did he?

A. Yes, sir.

Q. And just a little before he hit the Lucky Girl, didn't he blow again, also?

A. Yes, sir.

Q. Did he blow twice, then?

A. Yes, he blew when I notified him, and he blew, then, also, when he started to make a turn there.

Q. And who was at the wheel? The Captain was handling the Real—he was at the wheel?

A. No, sir.

Q. Where was the Captain? Down in the engine room?

A. He was alongside the man at the wheel, just in front of him there.

Q. Then did you see the Captain after the collision with a flash light in his hand?

A. Yes, sir.

Q. Did you go and call him and tell him the boat had hit—what had happened?

A. I didn't advise him; he was right there at once.

Q. Was he standing on the bow of the boat with you at the time the Real his the Lucky Girl?

A. He was amidships.

Q. Did you shout to the Captain and tell him the Lucky Girl had turned from her course and was coming across the bow of the Real?

A. Yes, sir.

Q. And just as you told the Captain, then he blew 2 whistles?

A. Yes, sir.

Q. And how long after the Lucky Girl turned across the bow of the Real was it before the Real struck the Lucky Girl?

A. It occurred right away as she was passing.

Q. Did you see the Tug Chagres in the center of the Canal going out?

A. No, sir; I didn't see the Tug.

303 Q. You say that after the collision the man on the barge gave you a line to make fast to the barge?

A. Yes, sir.

Q. And the Captain of the Real took the barge and towed it outside the channel?

A. Yes, sir.

Q. And he left it there, did he?

A. Yes, sir.

Q. And when he left it there it was on top of the water, was it not?

A. He left there when she went under.

Q. Where was the Lucky Girl at this time?

A. When?

Q. When the Captain started to tow the barge?

A. He was beside there where the collision occurred.

Q. Was the barge attached to the Lucky Girl at the time the barge sank?

A. Yes, sir.

Q. So that when the barge sank, she sank alongside the Lucky Girl, is that true?

A. Yes, sir; alongside.

Q. How far away was the Real at that time?

A. I don't know how far—what the distance was when that took place.

Q. The Real had gone and left the barge going down alongside the Lucky Girl?

A. No; she only just got down and the Real she remained near the Tug.

Q. Didn't the stern of the barge go down first?

A. I don't know what went down first. I saw it go down; that's all.

Q. It went down immediately after it was hit?

A. We had gotten her outside the channel and then she went down. When she struck she didn't go down immediately, and I got the line and made her fast and she went down after we got her outside.

Q. Did you see the hole that was opened in the barge at the time the Real struck it?

A. No; I did not see that.

Q. Were you not at the bow, looking at the barge, right there?

A. Yes; I seen everything but at night time and I didn't have a light to see at that time.

304 Q. The Captain had a flash light with him, didn't he?

A. Yes, sir.

Q. You couldn't see with a flash light?

A. No.

Q. Who asked you to come here to testify?

A. Capt. Elliot.

Q. Have you talked to anybody about this matter at all since the accident on the 31st of July, 1930?

A. No, sir.

Q. Nobody?

A. No, sir.

Q. When did the Captain ask you to come here and testify?

A. Last month, it was.

Q. And at that time you didn't talk to the Captain about it?

A. No, sir.

Q. You were the one that made fast the line that was handed from the barge to the Real, were you not?

A. Yes, sir; I was the one.

Q. And you made the line fast to the bow of the Real?

A. It was made fast aft; not to the bow.

Q. And did the Real turn around?

A. No; it didn't make a turn.

Q. The Real kept going straight along after you put the rope to the stern?

A. It went outside the channel.

Q. In other words, the Real kept along the same course after you tied the rope to her as she was going along at the time when she hit the barge, was it not?

A. Yes, sir; same course.

Q. Was the Lucky Girl in front of the barge or behind it when the Real struck it?

A. In front.

Q. The Lucky Girl was in front of the barge?

A. Yes, sir.

Q. As a matter of fact, the Real had begun to pass the Lucky Girl when the Lucky Girl swung into her, Isn't that true?

A. Yes; she was about passing her.

Q. And it was the Lucky Girl that swung into the Real and hit the Real, was it not?

A. Yes, sir.

305 Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. Did the Real hit the Lucky Girl, or did the Lucky Girl hit the Real?

A. The barge or the tug?

Q. The tow of the Lucky Girl. Did the tow of the Lucky Girl strike the Real or did the Real strike the tow of the Lucky Girl?

A. The Real was about to pass; the other turned in and they collided and I don't know which one struck first.

(Witness excused.)

The Court then, at 5:00 o'clock p. m., adjourned until 9:30 a. m., tomorrow, August 4, 1931.

306 United States District Court for the Canal Zone, Balboa Division.

Thomas R. Lombard, Libelant,
vs.
The Motor Ship Real, Her Engines, Boats, Boilers, Tackle, Apparel, Furniture, Etc., Etc., and Hans Elliot, Owner of Said Motor Ship Real, Respondents.

Hans Elliot, Cross Libelant,
vs.
The Motor Vessel Lucky Girl, Her Engines, Boats, Tackle, Apparel, Furniture, Etc., Cross Respondent.

In Admiralty No. 1028.

Hearing (Continued).

August 4, 1931.

Court convened at 9:30 A. M.

Mr. Van Siclen:

At this time we introduce in evidence the deposition of C. H. Magee, marked Exhibit "F", on stipulation of Counsel, it being agreed that we would offer it as an Exhibit, rather than read it into the record. (See page 133 of this record. Respondents' Exhibit "A" is there introduced, this deposition being, also, part of Exhibit "A".)

The Respondent and Cross-Libelant now offers in evidence the deposition of C. F. Magee, taken on July 31st.

Mr. Carrington:

No objection.

The Court:
Let it be admitted.

THOMAS INVERDALE was called as a witne for the Respondent and Cross-Libelant, and after having been duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):
Q. State your name.
A. Thomas Inverdale.
Q. How were you employed on the date of July 31 1930?
A. I was seaman on board the Real.
Q. What is the Real?
A. A motorboat owned by Mr. Elliot.
Q. Did the Real start on a voyage somewhere o the morning of July 31, 1930?
A. Yes, sir; for Agua Dulce.
Q. Did the Real, while in pursuit of tha
307 voyage, come into collision with some othe vessel or vessels?
A. Yes, sir; we came in contact; in collision wit a barge.
Q. Was the barge attached to any other vessel?
A. Yes, sir; the Lucky Girl was with the barge
Q. State in your own words, beginning with th time you left port at Balboa up until the collision jus what was done and what you saw and what yo heard.
A. The morning in question we left Balboa fo Agua Dulce. When we was before the Panama Cana Oil Crib we saw a boat coming from the direction where the dredge was being in operation in the Canal the Real was, also, there, too. The Captain the asked me if I saw a light coming on. I told him, yes He said "Keep over to your right." I did so. I

going on to the right, the Lucky Girl was continuing to our course, also for a short while after coming straight direction, as you pass on the port side of the Real, continuing like that for about 7 minutes, when the Captain told us to keep as close as possible to the white light, to keep clear of this fellow, so we did. Within about 60 or 50 feet she started to come across the bows of the Real. The Captain, therefore, tell me, "Throw your wheel hard over to port." I did so, when we came in collision with the barge. After the collision—

Q. What were your duties aboard the Real on this morning?

A. Beg pardon?

Q. What were your duties aboard the Real on this morning?

A. I was helmsman; it was my watch, sir; I had the wheel.

Q. You had the wheel?

A. Yes.

Q. And what was the position of the Real in the channel—

A. I was on the right hand side of the channel.

Q. —when you first saw the Lucky Girl?

A. I was a little to the right of the center of the channel.

Q. Do you know the direction of the Canal?

A. Yes, sir.

Q. What is its direction?

A. The direction is southeast.

Q. And the other way?

A. Northwest.

Q. Were you west or east of the center line of the channel?

A. To the center?

308 Q. The center line.

A. I was to the west.

Q. You were to the west?

A. Yes.

Q. And what were the first lights you saw?

A. I saw 3 lights, but one was not perfectly visible on the Lucky Girl.

Q. What were those lights?

A. Green, white, and red.

Q. And how did these lights bear with reference to the Real?

A. Those lights, the port side of that boat was coming to our port to clear on our port side; yes, sir.

Q. And then what order did you get?

A. I got the order to keep over more to my right.

Q. Did you continue to see the red and green and white lights?

A. No, sir; the green light was never very sharp and within a couple of seconds it disappeared.

Q. What lights did you see?

A. White and red, continuously, sir.

Q. And then did you continue to approach the oncoming vessel, seeing only its red light?

A. Obeying the last order of the Captain, I kept as close as possible to the range of white lights on my right; I did so, sir.

Q. What was the position of the Real in the Canal at the time the Captain told you to go more to the right?

A. We was in the Canal, sir—the channel—to the right of the Canal channel, but not very near the boundary or range of white lights.

Q. You don't understand me. If you know, where was the Real in the Canal with reference to some physical object—some dock or some other object at the time you first got the order to go more to the right?

A. The Lucky Girl was in the Canal; whether in the center or a little more over, I don't know, but he was in the Canal channel.

Q. Do you know where the dock called the Oil Crib is in Balboa?

A. Yes, sir.

Q. At the time you got the order—the first order to go to the right where was the Oil Crib at that time?

A. The Oil Crib was to my left hand.

369 " Q. Had you passed it, or not?

A. I was just a little past the Oil Crib.

Q. And how far to the right did you go then?

A. I went a fairly good distance to enable the other boat to pass on the port side. Not very much at that time.

Q. And how do you know that you went to the right hand side of the Canal?

A. Because I was nearer to the white and to the red lights on the left.

Q. What lights?

A. The white lights that mark the Canal channel; I was nearer the white than to the red light on the left.

Q. What do you call those things the white lights are on?

A. Buoys.

Q. Did you receive any further orders after that to go to the right?

A. Yes, sir.

Q. Where was the Real at that time when you got the second order?

A. To the right hand of the center of the Canal channel.

Q. But with reference to these buoys you speak about?

A. We were inside the buoys, sir.

Q. Do you know the last buoy the Real had passed before you got the second order to go to the right?

A. The one that I was steering to—that first—the more brightest light to me, was the number 9 buoy, sir, but I don't remember the buoy I passed before, that was just about where the collision occurred.

Q. And where was the Lucky Girl and its tow—

A. At that time the Lucky Girl—

Q. —at the time you got the second order to go to the right?

A. When I got the second order, the Lucky Girl was coming about 40 or 30 feet from the port side of the Real.

Q. And what lights did you see on the Lucky Girl then?

A. White and red.

Q. And when, if ever, did you again see the green light on the Lucky Girl?

A. Just a little before the collision.

Q. How did you come to see it at that 310 time?

A. It changed its course to come across the bow of the Real.

Q. (Handing witness Exhibit "A", Chart) Handing you Exhibit "A", show the Judge how the 2 vessels were coming together.

A. When I first saw the boat it was here (indicating on chart). I inclined this way (indicating) and then went this way (indicating). I went further here (indicating).

Q. Which is the Real?

A. This is the Real (indicating) and this is the Lucky Girl (indicating). When this (indicating) was on the port side, it was about 50 or 40 feet coming on direct past. When about 60 or 50 feet away, come right this way (indicating).

Q. Who did?

A. The Lucky Girl came this way (indicating).

Q. Did she have a tow with her at that time?

A. Yes, sir.

Q. And then did the tow and the Real come together?

A. The tow, oh, yes. The Real proceeding this way (indicating) and the Captain told me to go hard over to port, and I did so, when it came in collision with the barge here (indicating) at that time.

Q. When you say you put the wheel hard over to port; which way did the bow of the Real go?

A. Inclined this way (indicating) to go to the stern of the barge.

Q. To go to the left or right?

A. To the left.

Q. How long was it from the time you first saw the lights of the Lucky Girl to the time of the collision?

A. From 7 to 10 minutes.

Q. And how long was it that you were running toward the Lucky Girl seeing only the Luck Girl's red light?

A. No more than 7 minutes—maybe less—but a good time about 7 minutes, sir.

Q. Which way, left or right, did the Lucky Girl turn when she made the turn you say she did?

A. She turned to her left and to the right where we were.

Q. Towards the left?

A. To her left; to our right.

311 Q. Which way did her bow go?

A. It went right over this way (indicating), to her right hand position.

Q. Did her bow go towards the outside of the Canal, or toward the other side of the Canal—the Lucky Girl?

A. It appeared it was going to the mountain.

Q. To the mountain?

A. To the mountain; yes.

Q. Before she made the turn, did she blow any whistle, that you heard?

A. No, sir.

Q. Where was the Captain of the boat, the Real—

A. He was right before—

Q. when you first saw the light—the red and green light, that you spoke about, of the Lucky Girl?

A. The red and green light? He was right at the pilot house.

Q. (Handing witness blue print, Exhibit "E".) I show you Respondents' Exhibit "E" and ask you to point out—do you know what that is?

A. That is the Real.

Q. Where was the Captain?

A. He was here at the wheel house (indicating on Exhibit "E"); the Captain was here; yes, sir.

Q. And did you tell the Captain when you saw the red and green and white light ahead of you?

A. Oh, yes; he asked me if I saw those lights coming, and I told him yes.

Q. Did the Captain remain there by the pilot house?

A. Yes; until the collision.

Q. Do you know what he did then?

A. After the collision?

Q. Yes; after the collision.

A. Yes.

Q. What did he do?

A. He went and asked them if they needed any assistance and one man cried out "The barge is abo sinking." He then ordered a line to be made fast to the barge.

Q. Did you tow the barge?

A. Yes, sir.

Q. How long did you tow the barge?

312 A. I would say from the collision to the time the barge was sunk was about 5 minutes.

Q. And which way did you tow it?

A. Outside the channel; to the mountains.

Q. To the west side or the east side?

A. To the west side.

Q. And then, after the barge sunk, what did the Real do?

A. The Real asked the Captain if they needed any more assistance; the Captain said no, the barge was already sunk.

Q. (Handing small ship models to witness.) Using these models, show how the 2 vessels came together did you see the actual coming together of the 2 vessels?

A. Yes, sir.

Q. Then show us with these vessels (models) just how they came together—I mean the relative positions.

A. The way the collision came?

Q. Yes.

A. This was the position of the Lucky Girl (indicating) and this was the position of the Real (indicating) and they came together just that way (indicating).

Q. And is this (indicating) supposed to be the Lucky Girl or the barge?

A. The barge.

Q. And this is the way they came together?

A. Yes, sir.

Q. How did the Real get in position to take a line from the barge?

A. She go right around this way (indicating) to take the line. The line was taken around this way (indicating). The engine of the Real was stopped and we proceeded around her and.....her for the line and when the line was passed about three minutes after we left the channel to the right the barge sunk.

Q. How long after the impact of the Real with the barge was it that the barge sank?

A. From the collision to the time the barge sunk was 5 minutes, not more.

Q. Do you know, of your own knowledge, that the Real was in the channel?

A. Sir?

Q. Do you know, of your own knowledge, that the Real was in the channel?

A. In the channel; yes, sir.

Q. And you testified, under oath, that the
313 Lucky Girl was in the channel?
A. Also.

Cross-Examination.

(Questions by Mr. Carrington):

Q. Did I understand you to say that it was the Captain of the Real that called your attention to the oncoming lights of the Lucky Girl?

A. Yes.

Q. What did he say?

A. He asked me if I saw the lights coming on.

Q. What did you tell him?

A. I told him, yes.

Q. And at that time the Captain was to your left, was he not?

A. When he spoke about the lights?

Q. Yes.

A. No; he was right at the left hand window over the engine room.

Q. To the front or to the right?

A. It was to my left hand.

Q. I asked you that; was he to your left?

A. Yes; left side.

Q. And at the time the Captain called your attention to the lights you looked and how many did you see?

A. I only saw 2 that time.

Q. Only 2?

A. Yes, sir.

Q. When the Captain called them to your attention?

A. Yes. Before he called my attention I saw the 3 lights; one was partly visible, but it disappeared when the Captain called my attention. I saw the light previously.

Q. You had seen the lights before?

A. Yes; before the Captain told me anything.

Q. And where was the Lucky Girl at that time in relation to the dredge? Had she reached the dredge yet, or had she passed the dredge coming in?

A. No, sir; we was far away from reaching that dredge to the south; we were this side (indicating).

Q. The Lucky Girl, had she reached the dredge or passed the dredge?

A. I cannot tell you; I saw it coming
314 from the direction of the dredge in the Canal, but whether yander to me I don't know; it was pretty far away.

Q. And did you see the dredge in the channel?

A. It was at the left hand side of the channel working when I was passing; I saw where it was.

Q. At the time you saw the Lucky Girl did you see the drdege?

A. Yes, sir.

Q. Did you see the Tug Chagres?

A. No, sir.

Q. You didn't see that?

A. No, sir.

Q. You say the Lucky Girl was in the center of the channel when you first saw it?

A. I cannot say it was perfectly inside the center, because it was far away, but it looked like it was in the center.

Q. And where were you at that time? In the center of the channel, also?

A. No, sir; a little inclined to my right of the Canal channel.

Q. About how far away from the center of the Canal channel?

A. Not more than a couple of yards.

Q. About six feet?

A. A little more than that.

Q. Give us an idea.

A. We always keep to the right side—

Q. How many feet from the center of the channel were you?

A. About 12 or 16 feet or so on.

Q. And for how long a time did you see the green light of the Lucky Girl—the green light, the red light and the white lights—how long did you see these three lights?

A. The red and white from 7 to 10 minutes—the white and red the green light a very short time.

Q. About how long?

A. A few seconds.

Q. About 10 seconds?

A. About that.

Q. So you saw all three lights for about 10 seconds, and the other two lights up until the collision. Is that correct?

A. Yes, sir.

Q. Did you, at any time, ever see only
515 one light on the Real—one white light?

A. One white light?

Q. Yes.

A. I seen white and red continuously.

Q. So from the time the Captain called your attention to the lights on the Lucky Girl that were approaching, up until the collision, you saw 2 lights?

A. Yes, sir.

Q. Did the Captain see those 2 lights, also?

A. I don't know if he did; he never told me anything; he told me to keep to the right.

Q. Who else did the Captain talk to besides you—anybody else?

A. At what time, sir?

Q. Up until the collision.

A. The Captain never spoke to nobody, but the man at the lookout spoke to the Captain to tell him something about lights. What the man at the lookout told him I don't know. He never spoke to anybody except me. He spoke through the trumpet to the engineer below. Nobody else; I never heard him.

Q. Did I understand you to say after the Real struck the barge you stopped your engines and went around the barge?

A. No; the collision stopped the engine.

Q. The collision stopped the engine.
A. Yes, sir.
Q. The engines were not stopped until you struck?
A. Not at all.
Q. And you were going full speed ahead were you not?
A. The boat, yes; but not the engine.
Q. The boat was going full speed ahead?
A. Yes.
Q. And how was the engine?
A. It was going slow, because it would not be able to answer the reverse until it slowed.
Q. You were running full speed ahead on a slow engine?
A. The power of the boat, I believe, w
316 so short when we saw the boat coming across the Real it couldn't check the speed. It wa not slow at that time.
Q. You say the Lucky Girl came from the center of the channel and came across the bow of the Real?
A. No, sir; it inclined towards the right and remained there about 30 or 40 feet coming to pass straight on the port side.
Q. It was inclining to you all the time?
A. No; no; no. When the Captain told me first to keep over to my right I did so, and I seen the Lucky Girl inclining also over to my position. The Captain asked me to keep as near as possible to the white range lights to keep clear of this fellow and I did so. When he was going to pass our left hand side to port the port light was visible and also the white light of the Lucky Girl.
Q. The Captain told you to put your wheel to port?
A. Hard over to port.
Q. Did you do that?
A. Yes, sir.
Q. Did the bow swing to port?
A. Very little; only a trifle.

Q. She does not swing very quickly?

A. The distance was too short and we didn't wa the Lucky Girl to run across the bow trying to avo the collision. The distance was so short we came in collision.

Q. The distance was so short the Real could n change course?

A. She could not pass to clear around the stern.

Q. How far were you from the Lucky Girl at t time the red light disappeared?

A. When the red light disappeared and the gree light disappeared was when it came diagonally acro to the Real.

Q. How far distant?

A. About 50 or 60 feet.

Q. Indicate in here the distance.

A. The length of this Court Room.

Q. The length of this Court Room?

A. Yes.

Q. And just as the light disappeared the red ligh disappeared you got orders to swing to port?

A. The green light was just to be ap
317 pearing and the red light was not completel disappeared yet when I got the order. saw the inclination of the Lucky Girl was to com across to the outside of the channel.

Q. Yes, and within that 50 or 60 feet the Lucky Girl swung and got her bow and the bow of the barg past your bow, did she not?

A. No, sir.

Q. Where did you hit the barge?

A. The Lucky Girl with the barge was proceedin across when we hit; we were trying to avoid the col lision, when it struck the barge.

Q. Within 60 feet the Lucky Girl could swin across and you couldn't swing in that 60 feet?

A. I beg pardon.

Q. Within 60 feet the Lucky Girl could swing across and you couldn't swing in that 60 feet?

A. I can't swing.

Q. The Real?

A. The Real could not get out of the way at that time. It was too short a distance.

Q. And you don't know where the Lucky Girl was when you first saw her?

A. Yes, sir; I knew where it was.

Q. Where was it?

A. It was in the Canal channel.

Q. In what position? Before the dredge or behind the dredge?

A. I cannot tell you, sir, it was so far away.

Q. Was it about a mile away?

A. I dare say a little less than a mile.

Q. Then at the time that the Real struck the barge her bow was swinging into the channel, was it not?

A. What bow, sir?

Q. The bow of the Real?

A. When it hit the barge?

Q. Was it swinging into the channel?

A. By the order I received; it was in the channel all the time.

Q. Did the bow swing to port?

A. Yes, to port, but it never answered so readily, as the distance was short.

Q. And you were not going outside of the channel, were you, at the time of the collision?

A. No, sir.

Q. I will ask you whether or not on the
318 first day of August, 1930, in the Port Captain's Office in Balboa, in the presence of the Port Captain, Lieut. Byrholdt, Mr. Elliot, Mr. Lombard, and some others; you testified; under oath.

A. I did, sir.

Mr. Van Siclen:

If the Court please, I object to this, as being irrelevant, immaterial and incompetent; what he told them, if he told anything.

The Court:

He is laying a foundation for something. The objection is overruled.

Mr. Van Siclen:

Exception.

Q. I will ask you if you made this statement at that time and place: "The Captain told me to keep to port side as much as I could but boat did not move readily and we struck barge." Did you say that?

A. I said the Captain told me to put the wheel over to port before the collision.

Q. Then you didn't say what I just read?

A. He never told me to put the boat over; he told me about the wheel, sir.

Q. And did you make this statement: "Then after that was done the Captain hollered to back up engine and we went to assist"?

A. I cannot tell you if I said that, because I never heard the word the Captain spoke to the engineer, and that's some mistake, sir.

Q. I see. I will ask you if this question was put to you at the time and place just mentioned and in the presence of the parties mentioned: "Q. What lights did you see when you first sighted the tow?" Was that question asked you?

A. Yes, sir.

Q. And did you make this answer: "A. When we were in steady position I saw three lights when we were far away"?

A. Yes, sir.

Q. " a white, green and red lights

A. Yes, sir.

Q. "—I saw them when the tow boat was in area before the dredge." Did you make that statement?

A. That was in that; yes, sir; it was so.

Q. Was this question also asked you at the time and place mentioned: "Q. Did you see these lights for some length of time"? Was that question asked you?

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A. I cannot remember all the questions that was asked me. I kept no memory of that, sir.

Q. And did you make this answer: "A. Not very long. I saw these 3 lights nearly 5 minutes and afterwards I only saw two." Did you make that answer?

A. Probably I did. I cannot remember the exact word I say; it is so long I don't remember nothing about it.

Q. It is so long you don't remember anything about it?

A. I cannot remember anything I said in the Captain of the Port's office.

Q. Your memory is clearer now about what occurred—

A. Yes; sir.

Q. —than when you testified on the 1st of August?

A. No; but I am speaking the truth.

Mr. Icaza:

I must call the Court's attention to Capt. Elliot making signs to the witness. I have called this to the attention of Mr. Parker and Mr. Walker.

The Court:

Of course, I didn't see it, but I warn you that that would be contempt of Court. If it has been occurring, don't let it occur again. It is a mighty serious offense.

Q. You are speaking the truth to me, are you?

A. I will, sir.

Q. Did you speak the truth on the first of August, 1930?

A. Oh, yes; I did, sir.

Q. How long does it take to stop your engines, going full speed ahead?

A. I am not very much acquainted with that engine.

Q. You don't know?

A. No, sir.

Q. I will ask you if, at the same time and place and before the same parties, this question was asked you: "Q. How long does it take to stop and go full speed astern when you are running full speed ahead?" Was that question asked you?

A. I don't remember.

Q. Was this answer made to the question: "A. In shooting ahead full speed it would take quite a little time." Did you make that answer?

A. Probably I did; I don't remember what I said that day.

Q. Was this question asked you: "Q. Well, about what time?" Was that question asked you?

A. I don't remember what was asked me, sir.

Q. And did you make this answer: "A. About 3 minutes with full speed. Going slow it would take about 2 minutes." Did you make that answer?

A. Probably I did; I don't keep no memorandum of my testimony.

Q. If you made that statement, you knew how long it would take to reverse the engine running full speed.

A. To my opinion I might say—I may calculate to what I calculate it is, but I am not perfectly confident in the operation of that engine.

Q. But you were perfectly confident that afternoon in the Port Captain's office, were you not?

A. I tried to make the best explanation I possibly could, but I never kept no memorandum of it, sir.

Q. I think you stated a while ago that when you struck the barge your wheel was to port and the bow of the Real swung to port. Is that correct?

A. Slightly inclined to the left hand side, or port; yes.

Q. In that case, then, she would have been swinging inside the channel?

A. She was inside the channel always.

Q. I will ask you if, on the first of August, 1930, at the time and place mentioned before, and before the same parties, whether or not this question was asked you: "Q. Was the barge headed up the channel, out of the channel or in the channel?" Was that question asked you?

A. I do not remember.

Q. And did you make this answer: "A. It was headed out." Did you make that answer?

A. I don't remember, sir; it was a year ago and I never remember what I said that time.

Q. You do not remember what happened?

A. I am not speaking no lie; I am before the oath before God.

Q. You are not telling lies now?

A. No, sir; never did.

Q. Was this question, also, asked you: "Q. You was out of the channel?" Was that question asked you?

A. I do not remember the questions that was asked.

Q. And did you make this answer: "A.
321 Going outside." Did you make that answer?

A. I would be lying if I did make that answer.

Q. If you said that, you lied?

A. Yes, if I said we were going outside the channel.

Q. That was the day after the accident?

A. I don't remember, but if I said that I would be telling a lie—if I said I was going outside the channel.

Q. You don't remember anything you testified about in the Port Captain's Office?

A. Not one word.

Q. Let's see if you remember this: "Q. Did you turn all the way around?" Was that question asked you?

A. I don't remember what was asked me.

Q. And the answer: "A. No, sir." Did you make that answer?

A. I don't know if I did, sir.

Q. Did you turn all the way around?

A. After the collision?

Q. Yes.

A. Yes.

Q. You turned all the way around?

A. Yes; to get the barge in tow.

Q. And in order to turn around what did you do?

A. What did I do? The Captain took the wheel; the Captain operated the boat himself that time; but I don't know the channel the outside channel.

Q. What did he do?

A. After the collision?

Q. Yes.

A. I don't know. The Captain spoke to the engineer, but I don't know what he said.

Q. At the same time and place before mentioned on the first of August, 1930, was this question asked you: "Q. You stated that after the accident you assisted the barge over to the shoal water. From the time you struck the barge until you got under way, what maneuver did you make and which way did you put engine to get over there? Was that question asked you?

A. I don't remember.

322 Q. And did you make this answer: "A. Port side. It did not answer readily. Then I kept it as hard as I could as I saw the danger. Then I backed up, turned right around in reverse." Did you make that answer?

A. That never did happen until after the collision, so I don't know anything about that, before the col-

lision; I don't think some mistake there, sir. It was after the collision.

Q. You backed up?

A. Not me, but the boat was in operation by the Captain; that I don't know what the boat did more than the line towed the boat.

Q. Did anybody talk to you about the case last night?

A. No.

Q. When?

A. Last week.

Q. Who was it?

A. That gentleman (indicating) and Mr..... (indicating).

Q. Did the Captain talk to you about it?

A. Oh, yes.

Q. When did he talk to you about it?

A. 10 months ago—10 or 11 months ago—and last week last week and week before last.

Q. You didn't see him last night?

A. Yes.

Q. I thought you said you didn't see him last night.

A. This thing was going on this morning, he met me as we came.

Q. He met you at the railroad station?

A. He came on the barge and asked me I was coming here. I was working in Colon.

Q. And he told you he wanted you this morning?

A. He told me he called me at Cristobal Dock and said Mr. Elliot would come to take me to make my statement in this Court today.

Q. You say you don't know where the Lucky Girl was when you first saw her, except that she was in the channel?

A. Or was coming from the direction of the dredge in the channel.

Q. Then she had passed the dredge?

A. I cannot say; it was a great distance away; I didn't know whether it was yander or this way or it was in close proximity to the dredge.

Q. On the first day of August, at the time
323 and place, and in the presence of the persons before mentioned, was this question asked you: "Q. Light about where the dredge was working?" Was that question asked you?

A. If it was, sir, it was a right question, but I don't remember, sir, the word that was asked me.

Mr. Carrington:

I withdraw the question.

Q. I will ask the preceding question: Was this question asked you at the time and place before mentioned: "Q. You say when you first saw the Lucky Girl she was in the middle of the channel?" Was that question asked you?

A. That was about a correct question. I don't remember that question.

Q. Answer yes or no.

A. I do not know that question; it was a correct one, too, sir; I don't remember.

Q. Was this question, also, asked you: "Q. Right about where the dredge was working?" Was that question asked you?

A. That's the locality; yes, sir. I don't remember if the question is correct, but I know it is right.

Q. And did you answer: "Yes, a little bit the other side, more to sea." Did you make that answer?

A. Probably I did.

Q. You don't remember?

A. I don't remember what I said that day; I didn't keep no memorandum of that day.

Q. As a matter of fact, everything in connection with this collision has passed out of your mind, it being so long ago?

A. The collision?

Q. Yes.

A. No, sir; it is the same as yesterday.

Q. Everything is as fresh as yesterday?

A. Yes, sir; I never forget that accident till I die.

Q. And it is just as fresh in your mind as it was on the first day of August, 1930, is it not?

A. You mean the night of the 31st?

Q. I mean the first of August, when you
324 testified in the Port Captain's Office.

A. I never kept no memory of that, Captain of the Port Captain's office business. I thought that was finished; but the collision never come out of my mind till I die.

Q. I will ask you if this question was put to you, at the same time and place: "Q. Did you see the Chagres with the dredge in tow pass the Lucky Girl when she was about off the bow of the dredge?" Was that question asked you?

A. They asked me several times about the Chagres. I always said no, I never seen it.

Q. Did you answer: "No, sir"?

A. I don't know. I know it was correct. I never saw that boat.

Q. Was this question asked you, next: "Q. You stated you saw the Lucky Girl when she was beyond or seaward to the dredge?" Was that question asked you?

A. I don't remember.

Q. And did you make this answer: "A. Yes, sir"?

A. I cannot remember that time at the Captain of the Port's Office.

Q. How far were you the Real from the edge of the channel over to your right when the collision occurred?

A. A couple of yards, a few yards inside of the channel.

Q. Indicate in here about how far.

A. From this here (indicating) to the column outside there (indicating).

Q. Indicate inside this Court Room; we can't see outside.

A. (Indicating) To that column. If we had gone over more we would have been outside the channel.

Q. You were, then, about 14 feet away, were you?

A. I don't know the amount of feet, but it was that distance I showed you.

Q. From here to that rail (indicating)?

A. To the rail.

Q. That is about 12 feet?

A. I cannot tell you the feet, but it was about that distance.

Q. You were right between the buoys, were you not?

A. No; the buoy was always to my right hand; the starboard bow of the Real was always inside the range of light.

Q. Was it always inside the buoy?

A. Yes; actually.

325 Q. And you were pointing to the buoy all the time?

A. No, no, Captain the direction and I kept to the buoy light the starboard buoy.

Q. When did you first get to within 12 or 14 feet of the edge of the channel about what time?

A. After the last order of the Captain to keep as near as possible to the buoy white range of light.

Q. How far away were you at that time from the Lucky Girl when the Captain gave his order to keep as near as possible to the buoys?

A. To the collision?

Q. Yes.

A. About 7 minutes; about that.

Q. And the Lucky Girl at that time was right close to you, wasn't she?

A. Not very close; no; it was coming on to pass on the port side of the Real about 30 or 40 feet to the left or port side.

Q. About 30 or 40 feet to the port side, in front of you?

A. In front?

Q. Yes.

A. It was to my left inclined, yes; but not direct in front of me, no.

Q. That was the last time the Captain gave you an order to keep to your right?

A. Yes, it was coming on pretty far to pass correctly.

Q. How many orders did you get, in all, from the time you sighted the red and white light of the Lucky Girl until the collision? About how many times did the Captain tell you to go over?

A. First two. Two times.

Q. Twice?

A. Yes; twice.

Q. When he gave the first order the Lucky Girl was in the center of the channel?

A. More or less. I cannot say exactly in the center; it was in the channel.

Q. When he gave you the second order, which was the last order, she was 30 feet away from you and you were at that time 14 feet from the edge of the channel. Is that correct?

A. 30 feet from me? No, sir.

326 Q. When he gave you the last order?

A. No, sir; it was about 7 minutes distant, a good distance to my left hand; it was about 30 or 40 feet, coming on straight.

Q. You were 30 or 40 feet from the edge of the channel?

A. Not at all.

Q. You mean the Lucky Girl was about 2 mile distant from you when the Captain gave you the las order to keep to the edge of the channel?

A. No such thing, sir.

The Court:

He said 7 minutes distant.

Q. You said 7 minutes?

A. Yes, sir.

Q. And that was the last order you got?

A. Yes.

Q. And at that time you were about 30 feet from the edge of the channel?

A. From the edge of the channel the white ligh just this distance from here to that railing (indicating) there; here to here (indicating).

Q. About 12 feet?

A. Yes, sir.

Q. About 10 feet?

A. I showed you the distance; I didn't measure

Q. And for 7 minutes you kept on that course didn't you?

A. In a straight line; kept the buoy on my right hand; kept the boat inside the channel; we never got outside the channel on no account.

Q. You kept the course for 7 minutes?

A. From the position where we were when we saw the lights?

Q. Yes.

A. No; when the Captain gave orders to go over to the extreme edge and continue, the distance from the last order I received to the collision was about 7 minutes.

Q. About how far away was the Lucky Girl at that time?

A. From the Real?

Q. Yes.

A. At the time of the last order?

Q. Yes.

A. About 7 minutes distance.

327 Q. How far?

A. Pretty far.

Q. Very far?

A. Not exceedingly far.

Q. And she was in the center of the channel?

A. At the last order?

Q. Yes.

A. No, sir.

Q. Where was she?

A. When he gave me the first order, and I obeyed it, it was inclining into position on the right; then he gave me the second order to keep more over to the right hand side as near as I possibly.

Q. Was the Lucky Girl right to the edge of the buoy lights?

A. No; it was only to the center of the channel coming down.

Q. That's exactly what I wanted. Therefore, now, look at it. That (indicating) is the Real.

A. Yes, sir.

Q. Indicate the channel.

A. That's the channel (indicating).

Q. We will call this the center of the channel (indicating)?

A. Yes.

Q. You were up here (indicating) when the Captain gave his first order to go over to the right?

A. Yes, sir; about here all right (indicating).

Q. And you came down here (indicating) within 10 feet of the edge of the channel?

A. Not by the first order.

Q. By the second order?

A. I proceeded right here (indicating) and when I got the first order I was not very far, I came about here (indicating); then the second order came, to go as near as possible to this white range of lights.

Q. That's the distance you showed us here?

A. Yes; that distance from the white lights—about that distance.

Q. When you were here (indicating) before the first order, the Lucky Girl was in that position (indicating?

A. About that.

328 Q. Somewhere in the center of the channel?

A. Yes, sir.

Q. When you got the second order the Lucky Girl kept in the center of the channel?

A. No; I was here (indicating) and the Lucky Girl was inclining down here (indicating) to the right.

Q. The Lucky Girl inclined this way (indicating)?

A. Yes; after I came down the Captain said "Keep more to the right—as close as possible."

Q. You were here (indicating)?

A. I came right here (indicating).

Q. And the Lucky Girl was inclining more—

A. No; she was coming on straight to pass her like that inclination; when it came very near; she would have passed 30 or 40 feet to the port side, and when she got 60 or 70 feet away—about 50 or 60—

Q. She suddenly made a turn?

A. No; suddenly her inclined to come across the bow of the Real, when the Captain told me to put the wheel to port.

Q. Did you put the wheel that way?

A. The wheel was turned this way (indicating).

Q. It couldn't make it?

A. He proceeded right across here (indicating).

Q. Were you present during the time the boat was loading to go over on that—I mean to the Island?

A. Yes, sir.

Q. Who else was with you?

A. Plenty of the dock crew helping loading.

Q. Was the Captain there?

A. Yes.

Q. You had just come in from Agua Dulce prior to that trip, had you?

A. I cannot remember if we came from Agua Dulce, but I know we never remained very long in the harbor; I don't remember whether from Darien or Agua Dulce.

329 Q. And don't the Captain of your boat go to sleep sometimes traveling from Agua Dulce to Balboa? Don't he go to sleep?

A. He never slept, only a short distance sometimes when he is clear of the channel or the obstacles; he has a man, Navas, to represent him and give his orders; but when he came in the area or dangerous spot he does not go to sleep; he has someone wake him.

Q. How long have you been on the Real?

A. About 3 months before the accident.

Q. About 3 months?

A. Yes, sir.

Q. The Lucky Girl didn't blow any whistle, did she?

A. No, sir.

Q. Did the Real blow any?

A. No, sir.

Q. At any time?

A. Not before the collision; there was no whistle blown by the Real.

Q. Did she blow any after the collision?

A. I never paid any attention; I never had anything to do with the wheel until the Captain got back in the channel after the barge was sunk.

Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. If Mr. Lombard, and Mr. Elliot, and the Port Captain, and 2 or 3 other gentlemen asked you "did you see these lights for some length of time" and you

answered "not very long. I saw these three lights nearly five minutes and afterwards I only saw two." You told the truth, did you?

A. Yes, sir.

Mr. Carrington:

That is objected to; that is not a proper way of getting a former statement denied by a witness. Ask the question, and ask if that question was asked him; and then ask him if he had made that answer.

The Court:

He is confining himself to one of the questions you read to the witness?

Mr. Van Siclen:

Yes; I asked him if he told the truth at that time.

The Court:

Objection overruled.

Mr. Carrington:

Exception.

Q. If those gentlemen also asked you "What were they?" and you answered "A white and a red", you told the truth, did you?

A. Yes, sir.

Q. What did you mean when you said
330 the engines stopped at the time of the collision?

A. When the collision came, the collision stopped the engine.

Q. From where you stood at the wheel of the Real, could you see the engine?

A. I can see not all part of the engine, over the clutch and so on because the door of the engine room is right before—I can see some part of the engine.

Q. Have you anything to do with the engines, as a helmsman? Do you?

A. No, sir; I have nothing to do with the engine.

Q. After the collision did the Real, at any time, blow any whistles?

A. I cannot perfectly say, sir, because I was so much nervous that time I didn't pay no attention after the collision.

(Witness excused.)

(A short recess was then taken, at 10:45 A. M.)

CAPT. ALLEN STUART WALLACE was called as a witness on behalf of the Respondents and Cross-Libelant, and, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):

Q. State your name.

A. Allen Stuart Wallace.

Q. How are you employed?

A. I am employed as operator of the boat Indio of the Dredging Division.

Q. Of The Panama Canal?

A. Yes, sir.

Q. How were you employed on the morning of July 31, 1930?

A. As operator of the Indio.

Q. Were you on duty between the hours of 12:05 and 6:00 A. M., July 31, 1930?

A. Yes, sir.

Q. Of what do your duties consist?

A. My duties with the Indio consist of doing attending the Las Cruces; pipeline work; handling

swinging wires and anchors; handling oil barges, and water barges; in fact, any work of a small towing nature we are called upon to perform.

Q. Do you know a vessel named the Lucky Girl?

A. Yes, sir.

Q. On the morning of July 31, 1930, did
331 you see the Lucky Girl?

A. Yes, sir.

Q. State the circumstances in which you observed the Lucky Girl on that morning.

A. We was tied up outside of the Las Cruces; we had to shift on account she was swinging in to the buoy and we went on the outside of the Las Cruces, and tied up there and I heard 2 whistles from the Tug Chagres, and I knew by that there must be something else coming in. I went out to see if it was necessary for us to get out of the way, thinking if a large ship was approaching or passing the Tug and scow at that time it might be necessary. I observed the Lucky Girl. She was ahead of the dredge on a course that would have taken her out of the Canal channel. The Chagres came up astern of the dredge and passed parallel to the dredge in a diagonal course to the apex of the Canal. As the Chagres passed he passed the Lucky Girl about 150 feet ahead of the Dredge Las Cruces. At that time the Lucky Girl swung under her course and headed for the Dredge, and then straightened up and come in just south of Buoy 8—Buoy 7, rather the other side.

Q. When you first observed the Lucky Girl did she have a tow?

A. Yes, sir.

Q. What lights did you see when you first observed her?

A. When I first observed the Lucky Girl I saw 2 lights. There was 2 lights on the scow, seemingly hooked up on the davits on the scow, and she had one white running head light, and had a lantern on above that, and a lantern, as indicating towing lights.

Q. Could you see any side lights at that time?

A. No, sir.

Q. Then, when you seen her, as you testified to, heading toward the Dredge, what else did you see?

A. I saw the lights on the barge, on the outer edge of the barge, that came in line heading toward the Dredge. I saw 2 towing lights, and for a time I say her port running light—her red light—and then she went over on the swing—she straightened up and the red light went out of view again.

Q. And at this time when the red light went out of view was the Lucky Girl in or out of the channel?

A. She had just passed into the channel south of that white buoy. I judge 20 or 30 feet south of the buoy; she was in the location of the buoy; you could see her fairly plain.

Q. And did she continue in the channel,
332 then, as far as you observed her, thereafter?

A. The last I saw the Lucky Girl she was swinging, straightening up on course taking her to Balboa.

Q. At that time was she in the channel?

A. Yes, sir.

Q. Why was it not possible for you to see the green light, if you know?

A. Exactly I cannot state why I couldn't see the green light, but knowing the Lucky Girl and her tow, I know she had pumps on deck and quite a bit of obstructions and on the side there, you couldn't see her green light—running light.

Q. Were these lights on the barge being towed white lights?

A. As far as I could see, they were; she had plenty of white lights on her; in fact she—no, she had them hung up in the davits and I am quite positive she had white lights on the side of the scow, on that deck.

Q. How far off the dredge did the Lucky Girl pass?

A. She passed ahead of the dredge; she had just come into the prism line of the channel. I judge the Dredge was swung over to the east prism line to let the Chagres pass; I judge it was 425 feet from the dredge.

Q. When she passed?

A. When she passed into the channel.

Q. And then she was on the west side of the channel?

A. She was on the west side of the channel.

Q. Going toward Balboa?

A. Heading to Balboa.

Q. Did you later learn that the Lucky Girl had been in a collision that morning?

A. Yes, sir.

Q. How did you learn that?

A. At the time Mr. Lombard and the Lucky Girl came alongside the Dredge, about 4:30 in the morning.

Q. Describe what took place.

A. Mr. Lombard wanted to know if we
333 had seen the boat that had sunk his barge and put him out of business, as he put it, and we told him we hadn't seen the accident, but that we had seen the Lucky Girl come in the channel there, and he told us he had been waiting at the dock for the Lucky Girl to arrive from Chame and she hadn't shown up, and a little later the Lucky Girl came in and said that the Real had hit them when they had just passed back of the Chagres and the Real come out and hit the Lucky Girl, right to the stern of the Dredge. He wanted to know if we could not see the Lucky Girl on the other side of the channel at the stern of the Dredge. We later found out—we went out—I took the Indio and went to see if we could do anything to help them, and I found out she was up very close to a mile to the north, I should judge, from us, where she was sunk.

Q. When Mr. Lombard stated to you how this accident occurred who else was present?

A. Mr. Magee and, I believe, some of the deck hands on the Dredge—some of the men—deck hands.

Q. When Mr. Lombard stated to you the Real had come from behind the Tug Chagres, did you make any remarks?

A. Yes, sir; but at the time Mr. Lombard was pretty excited and I didn't think it was my place to start antagonizing him here, but I had known, happening as it did, it was impossible for the Real to come from back of the Chagres, as they had come back of the Dredge and the Lucky Girl come in from the Canal—it sounded mighty queer to me.

Q. Did you later on see the Real?

A. No, sir.

Q. Had you ever met the Lucky Girl and her tow in the channel prior to this time with your own boat, the Indio?

A. Several times.

Q. How did the Lucky Girl act at those times?

Mr. Carrington:

That question is objected to as incompetent.

The Court:

Unless it was at or near the time of the accident, sustained.

Q. As Master of the Indio have you ever had any difficulty, or near difficulty with the Lucky Girl and her tow in Balboa Channel prior to the collision or near thereto?

Mr. Carrington:

Objected to as incompetent, immaterial, and irrelevant.

334 The Court:

Sustained, unless it was near to or at the time of the accident.

Q. Did you ever have difficulty or near difficulty at or near the time of the accident with the Lucky Girl, and if so, when?

Mr. Carrington:

That question is objected to, also, on the same ground.

The Court:

Sustained.

Cross Examination.

(Questions by Mr. Carrington):

Q. Where was the Indio, your supply ship, at the time you heard the 2 blasts?

A. She was tied up on the outside, forward of the Dredge Las Cruces right alongside of the pump.

Q. In the channel or out of the channel?

A. In the channel.

Q. And where was the Las Cruces tied up?

A. The Las Cruces was digging on the east bank—the east side of the channel at that time she was right about her cutter was just ahead of Buoys 7 and 8.

Q. Was she at Buoy 9?

A. No.

Q. She was not there?

A. No, sir.

Q. The Las Cruces was up then at Buoys 7 and 8?

A. Between Buoys 7 and 8.

Q. (Handing witness Libelant's Exhibit No. 1) I am handing you Libelant's Exhibit No. 1, and ask you to indicate on it where the barge was.

A. The barge?

Q. Yes—the Dredge.

A. It was here (indicating) between Buoys 7 and 8.

Q. Please put a mark there.

A. It was right about there (marking on Exhibit 1).

Q. Will you mark that spot that you have indicated with the letter "H"?

(Witness marked on chart, Exhibit 1, as requested.)

Q. (Handing witness Respondents' Exhibit "A") I will ask you to look at Respondents' Exhibit "A" (chart), and show the Court the same position where the Dredge was located.

A. Right out here (indicating on chart, Exhibit "A").

Q. When you first saw the Lucky Girl
335 where was she in relation to the channel?

A. When I first saw the Lucky Girl she was in the channel, heading, I would say, a course that would take her out of the channel on the west side.

Q. And that was at the time, then, immediately after you heard the two blasts, was it not?

A. Yes, sir.

Q. And then you continued to watch the Lucky Girl, didn't you?

A. Yes, sir.

Q. Where was the Chagres at that time?

A. At that time the Chagres was she was passing about abeam of the Dredge.

Q. And you didn't pay any attention to the Chagres? You didn't watch her?

A. I noticed her coming, as you would notice anything going past the Dredge—ships.

Q. How long did you watch the Lucky Girl?

A. I looked up and I observed the Lucky Girl going out of the channel and I saw the Chagres coming

passing the Dredge, and a short time afterwards, the Chagres and her tow obscured the Lucky Girl passing ahead of the Dredge and as the Chagres passed ahead of the Dredge the Lucky Girl came in sight again.

Q. And you continued to watch her?

A. I saw her come back in the channel and straighten out.

Q. You saw her head back into the channel?

A. Yes, sir.

Q. Where was she at the time she headed back into the channel?

A. I would judge she was just outside the prism line on the west side.

Q. Then, I understand you to say, Captain, from your observation, she did go outside of the prism line, and then started to head back into the channel?

A. She was outside the prism line and then started to swing back in again.

Q. At that time you were to the stern of her over on the east side of the channel, were you not?

A. The stern of what?

Q. The Lucky Girl.

A. No; forward of her.

Q. When the Chagres blew, I understood you to say that you were alongside the Dredge.

A. Alongside the forward side—forward
336 end of the dredge—yes.

Q. And then the Lucky Girl at that time was steering a course that would put her out of the channel?

A. Yes.

Q. And then she did go out of the channel?

A. Yes.

Q. Then, do you want to state that the Lucky Girl and the Chagres met before the Lucky Girl reached the Dredge Las Cruces, and after the Chagres had passed the Dredge Las Cruces?

A. Yes.

Q. Was Mr. C. A. Magee working on the Las Cruces?

A. Yes, he was working as Mate that evening.

Q. So that if Mr. Magee testified that the Tug Chagres, the tow and the small vessel passed abreast of the Dredge—of the ladder of the Dredge—he would be mistaken, wouldn't he?

A. A little bit, a few feet; the ladder of that dredge is 75 feet long.

Q. And you say that when the Lucky Girl passed about abreast of the Dredge, the Chagres had already gone to sea?

A. No; she had proceeded on a course ahead of the dredge—a few hundred feet or more ahead of the dredge, bound to sea.

Q. So there was nothing between the Dredge and the Lucky Girl at the time you saw her outside the channel—at the time she was abreast of the Dredge, there was nothing between you?

A. She was abreast of the dredge when she passed the Buoy. At that time the Chagres had passed her.

Q. Where was the Chagres in relation to Buoy 7 at the time the Lucky Girl passed her?

A. The Chagres was to the south of the Buoy about 300 feet, 300 or 400 feet.

Q. And then, after that, about how long a time did you watch the movements of the Lucky Girl?

A. I didn't watch her for any time after that; I saw her come into the channel and straighten up, and I went off and left her.

Q. So when the Lucky Girl came back into the channel she had not yet reached the Dredge. Is that correct?

337 A. She was abreast of the Dredge at that time; she was abeam on the forward end of the Dredge—had practically the same relation as the Indio had with the Dredge.

Q. She was heading for the Dredge at that time?

A. No, sir; she was straightening up for Balboa, which would run her a parallel course with the Dredge.

Q. She had already returned from outside the channel?

A. Yes, sir.

Q. About how long would it take the Lucky Girl to swing around?

A. Do you want me to answer that? That's the question you objected to a minute ago.

Mr. Van Siclen:

Answer.

A. The Lucky Girl can turn around quick enough to take your breath away.

Q. How long would it take her to turn around? Just a beat of your hand?

A. Nothing turns that fast, but with a tow alongside, the Lucky Girl when she went astern, could swing that barge very fast. She would swing it much faster than she could tow it.

Q. Would it take half a second, or three minutes, or an hour?

A. She could have that barge from going straight ahead swinging at right angles in about 5 seconds.

Q. About 5 seconds?

A. Yes.

Q. Traveling at the rate of a knot and a half an hour she could swing the barge around in 5 seconds from traveling in a straight direction?

A. She did that with me one night.

Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. Do you know the forces that cause a vessel with a tow to swing around so quickly, as you have just described?

A. Yes, sir.

Q. Explain why a vessel with a tow swings as quickly.

A. The vessel is tight and, besides, the Lucky Girl, with the type of barge she had, when she is towing the barge ahead she has the barge slightly across the bow—made fast on the quater of the barge—and when she stops from going ahead—when she is under full head, stop and reverse the engines and go full astern, before you take headway off the barge, you swing it again and your swing is practically your forward
338. speed, plus that pulling back on one side. If you back up on a barge it swings at right angles, specially one that has not much power.

Re-Cross Examination.

(Questions by Mr. Carrington):

Q. In order to make this swing in 5 seconds, the Lucky Girl would have to stop and back her engines, and the barge would swing simultaneously?

A. No, sir; after the engines are going full astern, it would take about 5 seconds; she would be swinging fast.

Q. Proceeding full speed ahead and not reversing her engines, I understood you to say she could make that swing in 5 seconds. Is that correct?

A. Oh, no, you didn't—you didn't specify. You asked how long it would take to swing it after your engines were going full astern.

Q. Well, with the engines going full speed ahead?

A. That would be not nearly as fast.

Q. How long would it take?

A. It would take quite a while, depending on the action of the rudder.

Q. Would it take 3 minutes?

A. To put her at right angles to her course?

Q. Yes.

A. I really couldn't say how fast, going ahead. I had an experience with him swinging across. I am

speaking of an experience I had with her one evening coming up the channel, where she suddenly swung across my bow and I had to run out of the channel to clear the head of the scow.

Q. You don't know how long it would take to swing the barge going full speed ahead on the Lucky Girl?

A. Ahead; no.

Q. When you say it would take 5 seconds, to which direction to you refer; swinging to the right, or swinging to the left?

A. It depends on which side she is towing on.

Q. With the tow on the starboard side.

A. To port, backing down on her.

Q. She would swing the barge to port in 5 seconds?

A. Approximately, maybe more or less; I have never stood with a stopwatch in my hand taking a measure of the time — it is not quite accurate.

Q. And to starboard, with the Lucky Girl on the starboard side with the Lucky Girl on the port side of the barge, how long would it take to swing the barge to the starboard?

A. Backing up?

339 Q. Yes.

A. With the Lucky Girl on the port side of the barge she would not swing it; you have made a mistake on your sides.

Q. I want it just that way.

A. If the Lucky Girl was made fast—

Q. If he is on the port side of the barge and he wants to swing that barge to the starboard?

A. By backing up, did you say?

Q. By going forward.

A. Going forward?

Q. Yes.

A. I couldn't say, because I have not observed her doing that.

Q. I think you did.

A. No.

Q. You saw her come from outside of the channel back into the channel—to come back inside the channel?

A. Yes.

Q. You observed how long she took?

A. When you observe a thing, you don't stand there with a watch; you look and see the lights and range and the way she is swinging, and you see her swing back into the channel.

Q. You can estimate the time, can't you?

A. I really couldn't say. When you are estimating time that is a pretty funny thing. I told you what I observed, but I didn't observe any time at all.

Q. About how long did you observe the movements of the Lucky Girl from the time she passed the Chagres up until the time she got back into the channel?

A. From the time she passed the Chagres till she got back in the channel?

Q. Yes.

A. A few minutes.

Q. Three or four minutes?

A. Possibly; you can guess it as well as I can.

Q. I wasn't out there.

340 A. As far as observing the time, I might as well not have been there.

The Court:

If he can't answer, he can't answer; that's all there is to it.

Re-Re-Direct Examination.

(Questions by Mr. Van Siclen):

Q. With a vessel such as the Lucky Girl, having a tow alongside, using both the rudder of the towing vessel and the rudder of the vessel being towed, will it swing faster by reason of the extra rudder area than if such extra rudder area was not used?

Mr. Carrington:

I object. It is not only leading, but plainly sug gestive. It practically tells the witness exactly what t say—what explanation to make.

The Court:

The Court must take into consideration the inte ligence of the witness and his experience. The objec tion is overruled.

Mr. Carrington:

Exception.

A. If the barge had a rudder it would swing muc faster using the rudder of the barge than by using th rudder of the Lucky Girl alone.

(Witness excused.)

CAPTAIN JOSEPH MARTIN was called as witness for the Respondents, and, after having bee first duly sworn, testified as follows:

Direct Examination:

(Questions by Mr. Van Siclen):

Q. State your name.

A. Joseph Martin.

Q. Are you a master mariner?

A. Yes, sir.

Q. What certificates do you hold?

A. Coastwise, inland waters, and also unlimite pilot license for the Canal Zone.

Q. Quartermaster, or Master?

A. Master.

Q. How were you employed on July 31, 1930?

A. I was Master of the Steamer La Valley.

Q. To whom does the Steamer La Valley belong?
A. The Dredging Division.
Q. How long have you been employed as Master of the La Valley?
A. Off and on, about 8 years.
Q. How long have you been employed as Master of Towboats for The Panama Canal?
A. Twenty-three years.
341 Q. Have you done extensive navigation of Balboa Harbor and channel?
A. Yes, sir.
Q. In what work was the Steamer La Valley engaged prior to August 1, 1930?
A. We were going all over the Canal lifting different sorts of machinery, towing sand from Chame, towing barges, and general utility work.
Q. You frequently went in and out of the channel of Balboa Harbor?
A. Yes, sir.
Q. How much water did the Steamer La Valley draw?
A. Nine feet aft.
Q. In coming from Chame, where you dug your sand, where did you enter Balboa Channel?
A. Outside the sea buoys; picking a tow up outside, and then come in.
Q. Do you recall a Dredge working in Balboa Channel on July 31st, 1930, and some days prior thereto?
A. Yes, the Las Cruces.
Q. Have you had occasion to pass such a dredge?
A. Very often.
Q. What is the procedure in passing a dredge in the Canal?
A. To keep out on the port side if we had any barges had to do it, anyway; going out I had to keep on the starboard side.
Q. Is it necessary to blow a whistle in passing a dredge?
A. Always.

Mr. Carrington:
I object to that question as leading.

The Court:
Sustained.

Mr. Van Siclen:
The Master is testifying as an expert.

The Court:
That does not allow leading questions. Sustained

Q. What do you do when you want to pass a dredge in the Canal channel?
A. If she is on the east side of the bank I blow one whistle and pass to the starboard side, going out to sea.
Q. And coming in?
A. Coming in I blow two whistles.
Q. What does the Dredge do?
A. Answers me.
Q. In the night time, what else do you do?
A. In the night time?

342 Mr. Carrington:
That is objected to. We are trying to find out what happened on this particular night. We are not trying the La Valley.

The Court:
This man is called as an expert to tell what the signals should be at or near where this collision is supposed to have taken place. Is that the idea?

Mr. Van Siclen:
Yes, sir; and there is evidence that this dredge was here and an attempt was made to pass it, and we want to know what should be done.

Mr. Carrington:

The dredge was not in any collision. It was the Real and the Lucky Girl that were in collision. The collision took place some distance from the Dredge, between 2 other boats.

The Court:

The accident did not take place near the dredge?

Mr. Van Siclen:

No. sir; but the opening testimony was to the effect that this dredge was in the way, and in order to get by the dredge they had to go outside the channel, and, on cross examination, this fellow Smith testified that when he wanted to pass the dredge he did so and so.

The Court:

He testified as to the signals?

Mr. Van Siclen:

Yes, sir; he was questioned as to them and made his answers thereto.

Mr. Carrington:

The record is absolutely silent as to that. All Smith testified to was that when he saw the dredge he gave it a wide berth, and on this occasion he went out after the Tug Chagres appeared in the center of the channel and made him go out. The Lucky Girl was in the center of the channel and met the Chagres in the center going out, the Dredge was in his way or he would have gone to the starboard side; the Chagres gave him 2 whistles and he went out of the channel.

The Court:

This expert is here to tell what should be done when on pass a dredge.

Mr. Carrington:

The Dredge has nothing to do with this accident—it is not a question of what the Lucky Girl should have done in passing the Dredge—that has nothing to do with it.

The Court:

The Libelant contended that the Lucky Girl was outside the channel when this thing took place. Now, he had to explain why he was outside the channel, and he said he was outside because of this Dredge. I don't recall all the testimony, but I believe it was to the effect that he went out there in order to give the dredge a wide berth.

343 Mr. Carrington:

To give the Tug Chagres a wide berth; the Tug Chagres was in the center; the Tug gave him 2 whistles, which told him to go over to his left, as explained by Capt. Martin and by the Captain of the Lucky Girl, and then he went outside the channel.

The Court:

Because he was pushed out by the Chagres?

Mr. Carrington:

Yes, sir.

The Court:

He did that at the Dredge? Is that correct?

Mr. Carrington:

Yes, sir.

The Court:

They were all passing abreast?

Mr. Carrington:

Yes sir. He testified, further, he didn't come back in because he saw (immediately after he passed the

Chagres) this other light coming down the channel, and he wanted to give a wide berth to that boat, because he was afraid to get mixed up with the other boat. In fact, the collision took place between the Real and the Lucky Girl away down the channel and has nothing to do, absolutely, with the blowing of the whistle from the Dredge to the Lucky Girl, or from the Lucky Girl to the Dredge.

The Court:
The question of why the Lucky Girl went out of the channel abreast of the Las Cruces was testified to?

Mr. Carrington:
Yes, sir.

The Court:
Now, then, what an experienced man does in that situation at that point at that hour of the night would be competent as evidence.

Mr. Carrington:
Not unless they put the Chagres between the Dredge and the Lucky Girl.

The Court:
I guess you are right on that. You have got to fix up the same situation. Sustained.

Mr. Van Sicien:
Exception.

Q. In passing from the harbor at Balboa to sea, through Balboa Channel, upon which side of the channel do you proceed?

A. Starboard side, as a rule, coming in, going north, on the right hand side. I don't understand the question.

The Reporter read the previous question.

A. Starboard side.

Q. Is that the east or west side?

A. West side, leaving the harbor.

Q. If when so proceeding you observed
344 a vessel ahead of you, with a tow, what would be the proper signal?

A. That would depend on which side I wanted to pass: if I wanted to pass on the starboard side, I would blow one whistle; we, as a rule, keep on the port side in passing a vessel ahead of you, providing you get permission of the vessel ahead of you.

Q. What is the proper signal if you meet an approaching vessel?

A. If I meet an approaching vessel? Daytime or night time?

Q. Either daytime or night time?

A. Keep to starboard.

Q. What signal would you make?

A. One whistle.

Q. And that would indicate what?

A. That I was keeping to the starboard side of the channel.

Q. When would you blow two whistles?

A. If I wanted to keep over to the port.

Q. If you were to blow two whistles and receive no answer, what would you do?

A. I would slow my engines down—

Mr. Carrington:

That question is objected to. There is no testimony here that any whistle was blown.

The Court:

I cannot recall.

Mr. Van Siclen:

The Chagres went out the channel and blew this fellow two whistles, and because he blew two whistles

he went on one side, and on cross examination it was asked the expert, what if you do that and if you don't get any answering signal?

The Court:
Who was that?

Mr. Van Siclen:
Capt. Martin.

Mr. Carrington:
That has nothing to do with the Real and the Lucky Girl—absolutely nothing.

The Court:
On counsel's statement that the record shows this testimony—I don't recall it definitely—he may answer.

(The Reporter read the previous question.)

A. If I want to pass a steamer ahead of me on the port side I blow two whistles. If he don't answer my whistle it means he don't want me to pass on that side, and I would slow down, if I was too close to him, and wait until he blew me a whistle stating which side he wanted me to pass on.

345 Q. Would you attempt to navigate west of Buoy 9, Balboa Harbor, with a vessel drawing 9 feet of water, 2 hours after low water?

A. Outside the Buoy?

Q. West of the prism line; yes.

A. There is only one place where you could do it safely; that is south of the mine dock on the west side, but since the Cascadas has been digging and pumping mud over there, that's been pretty well stopped now—

Q. We are talking about Buoy 9, west of the prism line.

A. Would I go inside?

Q. Yes; go outside the prism line north of Buoy 9.

A. No, sir.

Q. With a vessel drawing 9 feet?

A. Not after 2 hours low tide.

Q. Do you know Mr. Lombard?

A. Sure, I know him.

Q. Do you know the barge he was operating in the sand business prior to July 31, 1930?

A. Yes.

Q. Do you know the condition of that barge at the time Mr. Lombard acquired it?

A. Do I know the condition of the barge when he bought it?

Q. Yes; do you know its condition when he bought it?

A. I didn't know the condition of the barage until I was taken over by Mr. Lombard to look the barge over, near Pinel's Place.

Q. When was that?

A. 1929; but I can't remember what month it was in; it was shortly after Mr. Lombard was on the La Valley with me down to Chame.

Q. What was the condition of the barge at the time Mr. Lombard took you to observe it?

Mr. Carrington:

That question is objected to. We are dealing with something that took place in 1930; not in 1929.

The Court:

Overruled.

A. The condition of the barge: The bottom was rotten, in fact, it was a barge made in Germany; had a wooden bottom in it and it was badly worm-eaten

and Mr. Lombard asked me what I thought would be the best thing to do with the barge. I told him at that time that I thought the best thing to do
346 was to put a steel bottom in it, but putting steel bottoms in down here costs considerable money, and Mr. Lombard thought about putting a wooden bottom in, even. At that time nothing was decided, as far as I can remember, what was to be done with the barge. Sometime afterwards he came down and questioned me again, and I went over with him, after working hours, and we come to the conclusion that wood would be very expensive. "Well", I says, "why don't you put cement in it; that's the one thing you can do." We talked the matter over and, eventually, he come to the conclusion he would put cement in the bottom of the barge and wire it so it would keep the cement down and secured, and with that I left.

Q. Would you say, having observed the barge this first and second time, that it was in good or bad condition?

A. You mean whether—

Q. Was the barge in good or bad condition?

A. When the cement was put in the hull?

Q. When you went to look at her.

A. No: I wouldn't care to have anything to do with the barge.

Q. Was it in good or bad condition?

A. I don't think it was good; in fact, I wouldn't have anything to do with it.

Q. Do you know, of your own knowledge, whether this cement was placed over the worm-eaten boards that you have talked of?

A. The timber that was eaten was down below the inside timber. The timber on the inside of the barge, so far as I could see, was in pretty good condition that is, as far as I could see. Her 8-inch timbers, and comprising about an 8-inch space between them, and that was all filled up with the cement and wire

nailed along considerable wire nailed all along the timber and the cement about 2 or 3 inches put over that and—

Q. Do you know of your own knowledge whether or not this cement was placed over the worm-eaten timber that you talked about?

A. No; the timbers I seen inside the barge I wouldn't say was worm-eaten. I don't know underneath them, but the timber below was worm-eaten.

Q. And the cement was put over that?

A. Yes.

Q. You know that of your own knowledge?

A. Sure; I was looking at it; I went down there and looked at it.

347 Q. What was the condition of the hull?

A. I never looked much at the hull. She looked to me pretty well rusted up; I never went around with a hammer and tested the plates, or anything like that; she was rusty.

Q. Did you observe whether the barge had bulkheads?

A. She had a bulkhead forward and one aft.

Q. Did they go crosswise, or fore and aft?

A. Tortuous right across you might call them collision bunkers.

Q. Did you observe or examine to see whether or not they were water tight?

A. No, sir; I did not.

Q. During the time the barge was operated as a sand carrier, by whom do you understand it was being operated?

Mr. Carrington:

That question is objected to.

The Court:

Sustained.

Mr. Van Siclen:
It is in evidence here of one company doing business and another company doing business.

The Court:
What this witness understands is highly incompetent.

Mr. Van Siclen:
A matter of general reputation.

The Court:
Sustained.

Mr. Van Siclen:
Exception.

Q. Did you ever hear of the Panama Sand Company? Do you know the Panama Sand Company?

Mr. Carrington:
That is objected to as hearsay—what he heard.

The Court:
Objection overruled.

A. Yes, sir.
Q. Do you know who the members of that company were?
A. I heard, but I don't know—

Mr. Carrington:
I object to what the witness heard.

The Court:
Sustained.

The Court then, at 12:00 o'clock, noon, adjourned until 1:00 p. m.

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348 Court reconvened at 1:30 p. m., with Capt. Joseph Martin on the stand.

Cross Examination.

(Questions by Mr. Carrington):

Q. If you were proceeding out of the channel you are, in the center of the channel meeting another vessel about the center of the channel, and you blow two whistles—

A. I don't catch the first part of your remark.

Q. If you are proceeding out of Balboa Channel, and you are about in the center of the channel, and you see an approaching vessel about the center of the channel, also, and you blow two whistles, what would you expect the approaching vessel to do, in regards—

A. I would not blow two whistles.

Q. I am asking you if you blew two whistles.

A. If I blew two he would answer me with two that is, if he wished me to pass on that side.

Q. If you blew two whistles—

A. I wouldn't blow 2 whistles.

Q. If you blew two whistles, what do you intend to tell the approaching vessel?

A. That I intend to keep over on the port side.

Q. And if the vessel that you blew to changed its course over to its port side would you continue on your course?

A. No, sir; I would not; I would stop and find out what he intended to do.

Q. You would stop and find out after you saw him change?

A. Certainly; I would not keep on to port and him keeping to port, too; we would have a collision.

Q. If you are going out and you keep to port and the next vessel keeps to port, you would have a collision?

A. No; if he keeps to port and I keep over to port we run clear.

Q. If, after you blew the 2 whistles and the approaching vessel changes its course to the port side and goes to port, would you stop?

A. Change his course. I understand you to say that if I were coming out and I blow two whistles that means I keep to port that's the way I understand your question. Is that right?

Q. No; I will ask the question again. If you blew 2 whistles, and, as you state, you mean you
549 are going to keep to port,—

A. Yes.

Q. and you saw the approaching vessel change its course and go over to port

A. Yes.

Q. the question is, would you stop?

A. No; I would continue if he went over to port that's what I blow my two whistles for.

Q. And regardless of whether he answered your signals or not, so long as he changed his course over to port, you would continue, wouldn't you?

A. I would blow him again to find out whether he heard my whistle or not; if he went over to port I would blow again to him.

Q. Although you saw him change his course and go to port?

A. I would keep to port.

Q. You said you went and looked at the barge?

A. Yes.

Q. When Mr. Lombard was placing cement in the bottom?

A. I was over there.

Q. And you saw the reinforced wires that were placed on her?

A. Yes.

Q. And you say you saw some timber?

A. I seen the timbers; yes.

Q. That were placed in there with the cement?

A. Yes.

Q. And how long did it take to put that cement in, if your know?

A. I don't know how long it took to put the cement in, but I was standing on the deck up above when he was placing some of the wires and cement in the bottom.

Q. At that time he had not started to pour the cement when he was placing the wire—had he?

(The Reporter read the previous question.)

A. He was putting the wires in.

Q. Would the fact that he placed cement on worm-eaten wooden timber affect the barge any?

A. Putting cement on worm-eaten wood?

Q. Yes.

A. It would strengthen the wood, to a
350 certain extent.

Q. Then it would not affect the bottom of the boat, would it?

A. That depends on where the bottom of the boat was, or anything like that. If she hit she would break the cement.

Q. Wasn't cement poured over worm-eaten timber in the bottom of the La Valley?

A. There is cement poured over the timbers in the bottom of the La Valley; we have cement in the bottom of the La Valley.

Q. Poured over the timber?

A. All round.

Q. Her bottom is all right?

A. Her bottom is in very bad condition, too; if you strike bottom you would have a hole in her.

Q. Was the bottom in bad condition on account of putting the cement down there?

A. No; it was put in there to stiffen her up because she was lifting heavy weights.

Q. And you also saw when Mr. Lombard was placing the machinery on the barge, didn't you?

A. What?

(The Reporter read the previous question.)

A. Yes; I did see that; I seen it off Dock 14.

Q. You saw all the pumping machinery?

A. I saw them put the machinery on the barge at Dock 14.

Q. All the machinery was new?

A. As far as I could see; it looked new to me.

Q. And at the time that you went and visited the barge with Mr. Lombard you were expecting to be the Captain of this barge and tug, were you not?

A. He made some offer of that kind; he made an offer of that kind to me.

Q. And later on you started a sand company in opposition to Mr. Lombard?

A. Sometime afterward, when I saw he didn't want me in the company, I started a business of my own.

Q. The sand business was pretty good, wasn't it?

Mr. Van Siclen:

I object. What's the idea whether he did or did not start a sand business?

Mr. Carrington:

This witness was put on as an expert and he went into the value of the barge, and as a portion of the losses sustained on account of the sinking of the barge it must be shown that the sand was worth something or that business was good or bad.

351 The Court:

Objection sustained; not proper cross-examination.

Mr. Carrington:
Exception noted.

Q. Are barges for sand very prevalent in the Canal Zone? Are they easily obtainable barges for sand?
A. Are they easily obtainable?
Q. Can you get them easily?
A. No; no outsider can get barges.
Q. You, yourself, couldn't get a barge to purchase for your business, could you?
A. No.

Re-Direct Examination.

(Questions by Mr. Van Siclen):
Q. If you blew a 2-whistle signal to an approaching vessel and received no answer, what would you do?
A. As I said before, if I didn't receive no answer I would slow down and wait and see what this fellow was going to do, but if he went to port I would continue on my course.
Q. This cement you spoke of as being in the La Valley; what was the purpose of that cement?
A. The La Valley is a boat which does considerable heavy lifting and she needs ballasting.
Q. And the cement was the ballast?
A. More for ballast than anything else.
Q. Were you in charge of the operation for taking off the machinery from the barge after it had been sunk?
A. Yes, sir.
Q. What machinery did you take off?

Mr. Carrington:
I object. This is not proper redirect examination.

The Court:
Sustained.

Mr. Van Siclen:
He spoke about seeing machinery put on board.

Mr. Carrington:
You are asking if he took it off.

The Court:
Sustained. Not proper redirect examination.

Mr. Van Siclen:
Exception.

The Court:
Neither was the other proper cross-examination.

(Witness excused.)

852. CAPT. C. M. LUTZ was called as a witness for the Respondents and Cross-Libelant, and after having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):
Q. How are you employed, Capt. Lutz?
A. Pilot, Panama Canal.
Q. How long have you been so employed?
A. Approximately 8 years.
Q. Have you a certificate as Pilot, issued by the Canal Zone Government?
A. I have.
Q. Do you have any other marine certificate?
A. I am master of all oceans; unlimited license.
Q. Issued by whom?
A. The Federal Government.
Q. By whom?
A. Local Board of Steamboat Inspectors.

Q. Are you a member of the United States Navy?

A. I am; I hold the rank of Lieutenant Commander, U. S. Naval Reserve.

Q. Did you serve actively during the War?

A. I was Lieutenant and Lieutenant Commander during the War.

Q. Have you been in command of vessels?

A. I have.

Q. In pursuance of your duty as Panama Canal Pilot, have you frequently been in and out of the channel at Balboa Harbor, from Balboa to sea, and vice versa?

A. I have.

Q. Can you give the approximate number of times?

A. Not less than 1200; I couldn't tell approximately, but not less than that.

Q. In pursuance of your duties as Pilot of The Panama Canal, have you handled vessels of all sizes and all drafts?

A. Of all sizes and drafts; yes.

Mr. Van Siclen:

I offer the witness as an expert, if the Court please.

Mr. Carrington:

We accept him as an expert.

Q. If you were meeting in the Balboa Channel another vessel, right ahead or nearly ahead, what would be your procedure?

353 A. Direct my course to starboard and pass [illegible] port to port.

Q. If you desired to alter your course to port, what would be your procedure towards the other vessel?

A. Should such a situation arise as would make [illegible] necessary, I would blow two blasts of my whistle

Q. In the event you received no answering signal from the approaching vessel, what would be your procedure?

Q. If you were to meet a vessel in the Balboa Channel, on your port side, showing you only her red light, what would be your procedure?

A. I would proceed on my course, at same speed. I would hold my course and speed.

Q. If you were proceeding out of Balboa Channel and was about to meet a vessel abreast of a dredge digging in the channel, what would be your procedure?

Mr. Carrington:

That question is objected to. There is no testimony here that the Lucky Girl was proceeding out of the channel. The testimony was that she was coming in; not going out.

The Court:

The Real was proceeding out. Is that it?

Mr. Carrington:

Yes, sir; but he places the boat opposite the Dredge, and the testimony was that he had not yet reached the Dredge.

By direction of the Court, the Reporter read the previous question.

Mr. Carrington:

The objection is still good, if Your Honor please, unless they want to put Capt. ..... on trial. It does not at all connect or have any probative force as to the two boats the Real and the Lucky Girl. He says "If you were proceeding out and you saw a boat coming in." That would be Capt. Martin. There is no libel between The Panama Canal and the Lucky Girl.

The Court:

The objection is overruled.

Mr. Carrington:
Exception.

A. I don't understand the question.

(The Reporter read the previous question.)

A. I see. The Rules of The Panama Canal would give me the right of way. I would proceed under the assumption that the other vessel would give me the right of way.

Q. If you were proceeding in the channel
354 and was about to meet a vessel abreast of the Dredge, digging on the east side of the channel abreast of that Dredge what would be your procedure?

A. If I were proceeding in, the vessel outward bound would have the right of way; I would hold my position until the other vessel passed the dredge, if it were evident that I couldn't clear in plenty of time.

Q. If it so happened that you were forced to your wrong side of the channel, because of special circumstances, what would be your procedure when the special circumstances cleared themselves?

A. Blow the danger signal to inform the oncoming vessel that I was unable to comply with the rules of the road. I think I don't quite understand the question.

(The Reporter read the previous question.)

A. I would endeavor again to go to my own side of the channel the starboard side of the channel.

Q. If, being forced out of the channel and circumstances cleared to enable you to go over to the other side and you observed an oncoming vessel, what would be your procedure?

A. If I were out of the channel?

Q. If you were forced out of the channel.

A. And the other vessel were coming? Can I assume there is plenty of clearance? How far away is the other vessel?

Q. You are testifying as an expert; what you would do and wouldn't do.

A. But I cannot, unless I know something of the conditions. I would endeavor, if I had clearance, to get to my own side of the channel—starboard side.

Q. What steps would you take to notify the oncoming vessel?

A. I would blow one blast and direct my course to starboard.

Q. Assuming the oncoming vessel was exhibiting its green light, under such circumstances who would have the right of way?

A. The vessel that was in the channel and on its own side of the channel would have the right of way. If the other vessel were out of the Canal—out of the channel,—and maintained green to green, no jeopardy would exist. The vessel out of the channel would be the burdened ship.

Q. When a red light is shown to a green
355 light, which vessel is the burdened vessel?

A. The vessel having the other vessel on its starboard bow.

Q. And on which side of a vessel is a green light?

A. The starboard side.

Q. (Handing witness booklet.) I hand you herewith Respondents' Exhibit "G" and ask you if you know what that is.

A. I do. Rules and Regulations Governing Navigation of the Panama Canal and Adjacent Waters.

Mr. Van Siclen:

I now offer in evidence Respondent's Exhibit G, Rules and Regulations Governing Navigation of the Panama Canal.

Mr. Carrington:
No objection.

The Court:
Let it be admitted.

Q. I ask you to turn to page 21 of Respondent's Exhibit G and explain to the Court what you understand by Rule 55.

Mr. Carrington:
That is objected to—for this witness to make an interpretation of law. This Court has held that these Rules and Regulations have the force and effect of law. Any interpretation to be placed on them must be placed by the Court—a legal conclusion. The witness is incompetent to make that.

Mr. Van Siclen:
It is a matter of Rules that we are reading. The question of law is for Your Honor to decide. I can put the question in a different way. I will accept the objection and will ask the question in a different way.

The Court:
Very well.

Q. What is the practice among pilots and navigators in general using the Balboa Channel, with reference to Rule 55 of the Rules.

Mr. Carrington:
The Rule is there and it is for the Court to interpret it according to the circumstances presented to the Court.

The Court:
I think that's correct; it is a question of law. Sustained.

Q. Do you consider the Balboa Channel a narrow channel, within the province of navigators and pilots in general?

A. Comparatively it is not; generally it is. In comparison to our Cut it is not narrow; in comparison to channels in general it is rather narrow.

Q. What is the rule in regard to ships going in and out of Balboa Channel as to their positions in such channel?

A. That they shall maintain their course on the starboard side of that channel in meeting vessels so as to pass vessels—meeting vessels—port to port.

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Q. What do you understand by the use of the word "burdened" vessel?

A. The vessel that is bound to keep clear.

Q. In the Rules of the Road would that have any relation to the tow or load?

A. Not within my understanding.

Q. What do you understand by the privileged vessel?

A. The vessel having the right of way.

Q. In pursuance of your duty as a Pilot of The Panama Canal, have your had occasion to handle vessels with as small a draft as 9 feet?

A. I have.

Q. (Handing witness Respondent's Exhibit "A"—Chart.) Looking at Respondent's Exhibit "A", Hydrographic Chart No. 953, I ask you would you consider it prudent navigation to take a vessel drawing not less than 9 feet outside and to the west of the prism line at Buoy 9?

A. I would not.

Q. Why?

A. I would consider that I would put my chip in danger of drowning at an even tide.

Q. Would you consider it prudent navigation on the part of one who did so?

A. I would not.

Q. What is the set of the tide or current, or both between Buoys 9 and 11, on flood tide?

(The Reporter read the previous question.)

Mr. Carrington:

Objected to, unless the witness is shown to have taken measurements.

Mr. Van Siclen:

The set of the current is the direction in which it goes. There are 2 forces—directions.

The Court:

He is using some nautical term that neither you nor I understand.

Mr. Carrington:

I can't accept an answer to a question I don't understand.

The Court:

If we discover the set of the tide is something on which we should use a tape measure, we will have to strike the question. You may answer.

A. In my experience with vessels, and with flood tide, the direction of the set, which is the direction the tide rules in and assuming the direction of the Canal to be north, is about north and to the east-
357 ward, between Buoys 8 and 9, that is going up the channel, the direction of the set is up and a trifle to the right—a ship will be set in that direction, almost habitually; of course, the wind being a factor.

Q. If a vessel was brought to a standstill between Buoys 9 and 11, which way would she drift?

A. Assuming no wind, in my opinion, she would drift to the northward and to the eastward—a trifle to the eastward—certainly not to the westward.

Q. In the case of an ordinary type of vessel—machinery propelled vessel—proceeding at full speed with its engines, and such engines are suddenly stopped and quickly reversed, does the speed of the ship through the water immediately diminish?

A. Depending on the weight of the vessel and the power of the engine.

Q. In a low powered vessel what would the result be?

A. In a low-powered vessel the result is not appreciable for a little time. In a high-powered vessel the result is apparent after less time. All of this depends entirely on the weight of the vessel, the speed at the time and the direction in which the head is swinging, if in any direction at all.

Q. Would the power plant of a vessel have anything to do with it?

A. Relatively, yes.

Q. In your experience as Pilot of The Panama Canal, have you handled tows?

A. I have.

Q. What is your experience as to the turning movement of a vessel having a tow on its starboard side, in reversing the engines?

A. It pulls the ship—pulls the tow's head to port, depending, of course, on the tie-up. On the usual tie-up that's what occurs.

Cross Examination.

(Questions by Mr. Carrington):

Q. Do I understand you to say that the set of the tide in Balboa Harbor about Buoy 9, inclines toward the eastward?

A. You mean the flood tide at that stage. I would say the inclination is decidedly to the eastward—to the northward and eastward.

Q. And it is very strong in that direction is it not?

A. Oh, no. It becomes less, perceptibly, as you proceed up the channel.

Q. I am speaking of the situation exactly at Buoy 9.

A. I am trying to establish in my mind the fact that you are not a navigator. It is extreme-
358 ly strong at the beginning of the channel—at Buoy 1—it becomes less, perceptibly, as one proceeds up the channel until at a point almost at Buoy 16, where the set, due to some deflection in the channel in there, sets the other way—with an ebb tide it is distinctly the other way.

Q. Between Buoys 9 and 11?

A. At approximately Buoy 9.

Q. So that a vessel proceeding south, out to sea from Balboa Harbor between Buoys 11 and 9 with an engine reversed, at full speed, would swing immediately to the north?

A. The current would have no bearing on it at all. It has no bearing on the ship. The current sets the ship bodily—not any particular part of the ship; the ship is held bodily in the tide; as far as the ship is concerned it has no bearing on one part or another at the time.

Q. Wouldn't that assist the bow in swinging?

A. Only if one portion was in the current and one portion not in the current—not when the entire ship is in the same current.

Q. With a vessel coming in with a heavy tow on its starboard side, proceeding full speed ahead, making with that full speed ahead 1½ knots an hour, between Buoys 9 and 11, would that vessel have difficulty proceeding, as I have before stated, in swinging over to port side?

A. You mean changing the position of the ship—changing the positions of the tow's head?

Q. Yes.

A. No; it would have no difficulty whatever.

Q. It would not?

A. No; it would have no more difficulty than in smooth water, assuming there is no particular wind, or something like that, to change it.

Q. Is it not a rule of the Panama Canal that small vessels in the channel must give the right of way to larger vessels?

A. That applies to Panama Canal craft, and the rule reads that Panama Canal craft shall give way to larger vessels, meaning, presumably, steamships, but nothing in that Rule will give them reason to violate the Rules of the Road. They must maintain the Rules of the Road.

Q. Assuming that you were entering the Balboa Harbor with a small vessel and a very large
359 tow, and you were about midway of the channel, and there was a dredge extending from the east apex of the channel inside the channel 135 feet. and there was a larger tug with another tow attached to its starboard side coming out; would you attempt to maneuver between that large tow coming out and the dredge which is 135 feet in the channel, considering the tug coming out with its tow is in the middle of the channel?

Mr. Van Siclen:

What channel?

A. You say it is 135 feet from the apex—you mean the prism line? The apex is the middle.

Q. The prism line—extending from the prism line.

A. And the other vessel is coming across from the westward or the eastward?

Q. The other vessel is approaching.

A. Straight out the channel?

Q. From the westward—the center of the channel, from the south.

A. Yes.

Q. And there is a large tug with its tow in the center of the channel proceeding direct to sea. Would you attempt to maneuver your vessel, coming into the harbor, between this tug and the dredge in that space that we have indicated?

A. I would have to know something of distances before I could give an answer to that.

Q. What is the distance of the channel?

A. 500 feet wide.

Q. We can get this easily. The dredge is 135 feet from the Canal prism, extending towards the center of the channel, and another boat with its tow attached to its starboard side is in the center of the channel coming out, and these vessels are going to meet opposite each other. Would you attempt, with a boat making 1½ knots an hour to maneuver your ship between the two, that is, the one going south and the dredge that is 135 feet within the channel, operating?

A. Assuming, then, that the distances were so close—that this oncoming tow was so close as to create a situation which would place all three craft in line at the same time, I would say that seamanship would dictate stopping my ship outside the channel until the vessel coming down the channel and having the right of way had cleared.

Q. You don't answer the question. Would you maneuver your ship between the oncoming ship and the dredge?

A. No.

Q. Assuming—I am talking to you as an
360 expert, and you are not supposed to know what took place—you are supposed to know nothing of that—you are talking as an expert of the facts here in evidence—assuming that the outgoing vessel, with its tow, blew 2 whistles, would you understand from that that the vessel that blew was going to port?

A. I would.

Q. If there was, then, plenty of room on the west side of the channel for you to continue on your course, would you say that it was seamanship to go off and proceed on your course, with no obstruction in sight?

A. Until I had passed this tow.

Q. You would consider it good seamanship to do so until you passed the tow?

A. Yes; under those conditions I would.

Q. Assuming then that, immediately after passing the tow, when you were on the west side of the channel, you saw an oncoming vessel approaching you, and not knowing its speed or how fast it was coming, and knowing your own vessel was going only 1½ knots an hour, would you consider it safe to attempt to go back to the starboard side, if, in your judgment, you hadn't sufficient space to make that maneuver?

A. That's rather difficult to answer. I don't know. I couldn't give an answer until I knew more of the distance how far the other vessel is away, and what the positions were. You say the ship with the tow was in the channel at that time. What part of the channel? Close to the buoys, in the middle of the channel, or where?

Q. Assuming that the vessel with the tow is outside of the channel on the western side about 20 feet at the time that it passed the other two obstacles the dredge and the towboat and then that another vessel at; say, about 1,000 yards away, was observed in the center of the channel approaching you, or coming down the channel, would you attempt, or would you consider it good seamanship or would you consider it a cautious move for the tug to leave its position 20 feet outside of the channel and proceed to cross back to the starboard side of the channel, not knowing the speed of the oncoming vessel?

A. Under those circumstances, no; 1,000 yards; speed unknown; and outside the channel; no.

Q. How long, in your opinion, would it take a vessel traveling at the rate of 1½ knots an hour to proceed from the center of the channel, return to
361 the center of the channel and then go outside of the channel again?

A. I don't know. I can let you know if you will give me the courses and a pencil and paper. That's pretty much involved. It is merely a matter of distance and time; you can figure it yourself.

Q. Between Buoys 9 and 10, within 800 yards, that is a straight distance, how long, in your opinion, would it take a vessel, traveling at the rate of 1½ knots an hour, to go from the center of the channel outside of the channel, then return to the center of the channel and go back to the Canal prism?

A. I don't know a mile and a half an hour—1½ miles an hour. I couldn't even offer a guess. It is a matter of mathematics. I would have to know the course the ship was on. I couldn't estimate until I knew the course the ship was on; no one could.

(Witness excused.)

CAPT. HANS ELLIOT was recalled as a witness for the Respondent and Cross Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):

Q. You are the owner of the Real?

A. Yes, sir.

Q. You were the owner of the Real on the morning of July 31, 1930?

A. Yes, sir.

Q. And on that morning did the Real come into collision with some other vessel?

A. Yes, sir.

Q. Was there any damage sustained?

A. Yes, sir.

Q. Of what did the damage consist?

A. She was

Mr. Carrington:

Just a minute.

A. On the starboard side 2 plates and some rivets bent in and on the port side one plate bent in.

Mr. Carrington:

I move that the answer be stricken with regard to the starboard side. There is nothing at all about the damage to the starboard side. The reference is only to the port side. The Bill of Particulars shows damage only on the port side.

362 The Court:

(Reading Answer No. 1 of Bill of Particulars.)

Mr. Carrington:

That is right, Your Honor.

The Court:

Objection overruled.

Mr. Carrington:

The objection is withdrawn.

The Reporter then read the previous answer.

Q. Describe fully.

A. That's all.

Q. Have you had this damage estimated?

A. Yes, sir; as soon as the Real first came back from Agua Dulce, Capt. Barnes and Capt. Svensson was down to look at her, in order to see if we could make any—and then I heard from the Mechanical Division—they estimated the value of the damage.

Mr. Van Siclen:

The amount of damage set forth in the libel is $750. I believe that's your own estimate?

A. That's my own estimate.

Q. And what was the estimate of the Mechanical Division?

Mr. Carrington:

That is objected to; it is all hearsay. The estimate of the Mechanical Division or any other Division is not a basis for damages.

The Court:

The best evidence is the man that looked at it, is it not?

Q. (Handing witness paper:) I hand you Respondents' Exhibit "H" and ask you if you know what that is.

A. It is an estimate from The Panama Canal, Mechanical Division of repairs for the Real.

Mr. Van Siclen:

I now offer in evidence Respondents' Exhibit "H".

Mr. Carrington:

Objected to as incompetent, irrelevant and immaterial all hearsay.

The Court:

It can be taken for what it is worth. It is an estimate.

Mr. Carrington:

The cross-respondent has had no opportunity to examine this estimate; no opportunity at all.

The Court:

The objection is overruled. Let it be admitted.

Mr. Carrington:

Exception noted.

Q. Your own estimate did not take into consideration dry-docking, did it?

Mr. Carrington:
Objected to as incompetent and irrelevant.

The Court:
Yes; that's immaterial. Sustained.

(Witness excused.)

363 JAMES BRADLEY was called as a witness on behalf of the Respondents and Cross-Libelant, and, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):
C. State your name.
A. James Bradley.
C. How are you employed?
A. As a leading man, shipfitter and boiler maker.
Q. Do your duties require you to make estimates of repair work?
A. Yes.
Q. Did you, in the course of your duty, estimate the cost of the repairs to the Real, caused by certain injury.
A. I did.
Q. (Handing witness paper.) I hand you Respondents' Exhibit "H" and ask you if that is the result of the estimate that you made.

Mr. Carrington:
That is, also, objected to now, as incompetent, irrelevant and immaterial. Damages—the measure of damages to anything—damages to anything—any ob-

ject whether it is an automobile, a ship or any other moving object, is not the estimated cost, but what it costs to repair it.

The Court:

I don't understand that rule of law. If a man has a chair broken, due to negligence, he has to have it repaired before he can prove damages?

Mr. Carrington:

Yes, sir.

The Court:

Objection overruled.

Mr. Carrington:

Exception.

Mr. Van Siclen:

We are working under the rule set forth by the Court in the case of Pennsylvania Railroad Company 466, where the Court said "One whose ship is wrongfully injured * * *." They may never repair it at all. Expect testimony was received.

The Court:

The objection was overruled.

C. You have made estimates on other vessels, have you?

A. I have.

Q. How long have you been engaged in making estimates?

A. About 5 or 6 years now.

C. And you went thoroughly into the injuries sustained by the Real?

A. I did.

304 Q. And that is your honest estimate of the damages?

A. Yes; to put the vessel in its proper condition.

Q. To put it back in its proper condition, the figure you arrived at was how much?

A. That I arrived at?

Q. That you arrived at.

A. With the damage to the shell, including the renewal of the—of the 2 fenders, was $630; that's exclusive of dry docking.

Q. Exclusive of dry docking. Would it be necessary to place this vessel in dry dock to make the repairs?

A. It would, because the A plate is under the water.

Cross Examination.

(Questions by Mr. Carrington):

Q. And the vessel has never been placed in dry dock?

A. No; because it has not shown any signs of leakage at the place of damage.

Q. And the vessel has been operating, to your knowledge, ever since and up to the present time?

A. I couldn't tell you; I simply estimated on the damages.

(Witness excused.)

Mr. Van Siclen:

The Respondents and Cross-Libelant rest.

(A short recess was then taken, at 2:15 p. m.)

C. M. LUPFER was recalled as a witness, in rebuttal, by the Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. Did you receive a subpoena to bring with you the records of the investigation into the collision be-

tween the Lucky Girl and the Real as are on file in the office of The Panama Canal? Have you such recor

A. Yes, sir.

Q. Are you the person in charge of such records?

A. Yes, sir.

Q. Is it your duty to keep and supervise such records?

A. Yes, sir.

Q. (Handing witness File 61-D-2 Real.) I am handing you Libelant's Exhibit No. 13-1, marked for identification, and ask you to tell the Court what that is.

A. It is the report of the Board of Local Inspectors of the accident between the Real and the sand barge.

365 Mr. Carrington:

I ask to withdraw the witness at this time, for the time being.

Mr. Van Siclen:

I have no objection.

The Court:

He may be withdrawn.

(Witness excused.)

LIEUTENANT A. J. BYRHOLDT was recalled a witness, in rebuttal, by the libelant, and testifi as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. Lieutenant, were you a member of the Bo of Local Inspectors on the morning of the 1st day August, 1930?

A. I was.

Q. As such member did you conduct an investigation into the collision between the Real and the Lucky Girl on the 31st day of July, 1930?

A. I did, as one of the Members.

Q. Who was the other Member?

Mr. Van Siclen:

If it please the Court, I object to the line of questioning as not proper rebuttal examination. There was nothing in the direct examination of Respondents and Cross-Libelant as to the Board of Local Inspectors, or whether any such Board exists.

The Court:

I don't know just exactly where we are getting to; the questions may be asked.

Q. Who was the other Member?

A. Captain Barnes.

Q. (Handing witness Libelant's Exhibit No. 13-1.) I am handing you Libelant's Exhibit No. 13-1, and ask you if the signatures appearing at the back of that—if the signature signed A. J. Byrholdt is your signature?

A. It is.

Q. I will also ask you if the signature marked G. C. Barnes is the signature of the other member of the Board that sat at the investigation.

A. It is.

Q. Have you ever seen G. C. Barnes sign his name before?

A. Many times.

Q. And you are familiar with his signature?

A. Yes, sir.

Q. At that investigation—I will ask you to turn to page 1 and state whether or not A. H. Ekstrand testified at that investigation.

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Mr. Van Siclen:
I again object. I cannot see the relevancy of th evidence—

The Court:
I still can't find out what the purpose is. Thes are preliminary questions. He may answer.

Mr. Carrington:
I must lay a foundation.

The Court:
Proceed.

A. He did.

Q. I will ask you whether or not he was sworn o that occasion.

A. He was.

Q. I will ask you to look at page 2 and stat whether or not Question 3, appearing on the sai page 2, was put to the witness and whether or no the answer following was made by the witness.

A. That was the question put to the witness an the answer made by him.

Q. I will ask you to look at the same page, No. 2 Question No. 7, and will ask you to state whether o not the question was put to the witness and whethe or not he made the answer that appears there.

A. He did.

Q. I will ask you to look at page No. 3, Questio No. 18, and I will ask you whether or not that ques tion was put and whether or not the answer to th question as appears on that page was made by him

A. The question and answer are both correct.

Q. The question was put to the witness and th answer was made by him, as appears there?

A. Yes, sir.

Q. I will ask you, as to Question 19, on the same page, if the question was put to the witness and if the answer following was made by him.

A. The question and answer are both as they happened that day.

Q. I will ask you to look at Question No. 20 and the answer thereto, and I will ask you if that question was put to the witness and whether or not the answer as shown in the record was made by him.

A. That question is as asked and the answer as given.

Q. I will ask you to turn to Page No. 4, Question No. 31, and I ask you whether the question as appears there was put to the witness, and whether or not the answer was made as appears on the record.

367 A. The question as it appears here is correct, and, also, the answer as given by the witness.

Q. I will ask you to look at Question No. 39, appearing on said Page 4, and ask you whether or not that question was put to the witness and whether or not the answer thereto was given by him as appears on the record.

A. The question is as put to the witness, and the answer as given by the witness.

Q. I will ask you to look at Page No. 5, thereof, Question No. 48, and state whether or not the question as appears on the record was put to the witness and state whether or not the answer thereto was made by him, as appears on the record.

A. The question is as put to the witness and the answer as given by the witness.

Q. I will ask you to look at Page No. 10, Question No. 1, and ask you whether or not the question as appears there was put to the witness and whether or not the answer thereto was given by him as set out in the record.

A. The question is as asked the witness, and the answer as the witness replied.

Q. I will ask you to turn to Page 11, Question No. 13, and ask you whether or not that question was put to the witness and whether or not the answer thereto was as given by the witness.

A. The question is as put to the witness and the answer as made by the witness.

Q. I will ask you to look at Question 17, Page No. 11, and ask you whether or not the question was put to the witness and whether or not he made that answer.

A. The question was put to the witness and that is his answer.

Q. I will ask you to look at Question No. 18, appearing on Page No. 11, and ask you whether or not that question was put to the witness and whether or not he made that answer.

A. The question is as put to the witness and that is his answer.

Q. I will ask you to look at Page No. 12, Question No. 21, and ask you whether or not that question was put to the witness, as appears on the record, and as to whether or not the answer thereto is as made by him.

A. Question No. 21 was as put to the witness and the answer as given by the witness.

Q. I will ask you to look at Page 12 and
368 tell the Court whether or not one Thomas Inverdale also testified at that investigation.

A. He did.

Q. Was the witness sworn to tell the truth prior to his testimony?

A. The witness was sworn and then examined by the Board.

Q. I will ask you to look at Page 13 of the Record of the Testimony of said Thomas Inverdale, Question No. 3, and state whether or not the question as appears thereon was put to the witness and whether or not the answer shown as made thereto was made by him.

A. The question is as put to the witness and the answer as made by the witness.

Q. I will ask you to look at Question No. 4, on said page 13, and state whether or not the question was as put to the witness, and the answer thereto as given by him.

A. The question is as put to the witness and the answer as made by the witness.

Q. I will ask you to look at Question 7 on said Page 13, and state whether or not the question appearing thereon was put to the witness, and whether or not the answer thereto was as given by him.

A. The question is as put to the witness and the answer as given by the witness.

Q. I will ask you to look at question 8, on page 13, and state whether or not the question as appears thereon was put to the witness and whether or not the answer thereto was made by him.

A. The question was put to the witness and the answer is as given by the witness.

Q. Look at Page 14, Questions No. 18, 19, 21 and 23, as appear thereon of said page 14. State whether or not those questions were put to the witness and whether or not the answers to each question were made by him, as appears on the record.

A. The questions are as they were put to the witness and the answers as given by the witness.

Q. I will ask you to look at Page No. 15, Questions No. 27 and 28, and ask you whether or not those questions were put to the witness and whether or not the answers thereto were given by him as in the record.

A. The questions are as put to the wit-
368 ness and the answers as given by the witness.

Q. I will ask you to look at Page No. 16, Questions No. 43 and 44. I will ask you whether or not those questions were put to the witness and whether or not the answers thereto were made by the witness to the questions.

A. The questions are as they were put to the witness and the answers as given by the witness.

Mr. Carrington:

We now offer in evidence Questions Nos. 3 and 7, Page 2; Nos. 18, 19 and 20, of page 3; Nos. 31 and 39, of page 4; No. 48 of page 5; No. 1, page 10; Nos. 13, 17, 18 and 21 of page 11, of Libelant's Exhibit No. 31-1, of the testimony of one A. H. Esktrand, made on the first day of August, 1930, in the office of the Port Captain at Balboa.

Mr. Van Siclen:

The Respondents and Cross Libelant object very much. It is improper rebuttal. There is nothing in the direct examination on either side to the effect that any investigation whatsoever was held anywhere else. It is, therefore, irrelevant and immaterial and certainly incompetent. As a matter of fact, proceedings before these quasi boards are not permissible in Courts of law, anyway. And in Admiralty in Isthmus Courts in the case of the Grant vs. Eda, 14 Fed. 479, a leading case on the subject, the Court said "Under situations * * *." In addition, the whole thing is immaterial. It appears to be an endeavor to put in something that was before some quasi board. It has no place in this record at all, and certainly is not rebuttal.

Mr. Carrington:

Counsel did not mention that what he quotes refers to the findings of a Board. I am not offering in evidence any findings. Neither counsel nor anybody else can produce in this Court any law or any case decided showing that a witness cannot be impeached by showing he made contrary statements at some other times and some other place, and under circumstances that he should not make a contrary statement. That is a rule of evidence, and unless it was changed last night

or this morning early that rule of evidence is still there. A witness may be impeached. It is offered for the purpose of impeaching the witness.

The Court:

Of course, that rule about these reports of Steamboat Inspectors and people of that kind who go out and inspect the ship and decide what was wrong with it and what caused it and all that sort of thing is true under that case—those reports may not be received. They are, maybe, called as experts, but in
370 so far as to take their reports are concerned, they are of no more weight than the report of some stranger, as far as the trial of the case is concerned. They may be used as witnesses, but not their report. This situation here before us, as I see it, is this: If we are in error our error begins with the cross-examination by these witnesses of the respondent. The point is this: That the respondent—these witnesses, testified to certain things on cross-examination, over the objection of the respondent, and for the purpose of impeachment. We permitted counsel for the libelant to cross-examine and ask whether or not a certain examination was made of these men and whether or not at that time certain questions were put to them and whether or not they made certain answers. As I say, if here is any error on the part of the Court, the error began there. I cannot see it. I think it is a fundamental rule that a man may always be asked as to whether or not a statement he makes on the witness stand is contrary to one he made about the same matter, under certain circumstances, somewhere else, and that for the purpose of impeachment. Now, that being the case, the Court merely asks now whether every one of those questions that is now offered are questions which were propounded to the witnesses on cross-examination for impeachment.

Mr. Carrington:
Yes; Your Honor.

The Court:
In other words, what I am trying to find out is this: In cross-examination of these witness you said "Didn't you appear before a Board at a certain time—

Mr. Carrington:
Yes.

The Court:
Now, at that time, I ask you whether the following questions were asked? And the witness invariably said he didn't know or didn't remember, or something like that. Now then you went right ahead and asked him whether he made the following answer, and he would say he didn't recall, or maybe he did. Are these questions and answers which have now been identified by one of the men before whom they were made, the same questions and answers which were used by counsel for the defendant specifically in the cross-examination of these witnesses?

Mr. Carrington:
Yes; Your Honor. I asked the Doctor to take them down as fast as I called them out and I can say that I have them marked off, and they are marked off now on my copy of this testimony, and if there is any error, why it is not an error on my part. But they were all marked out here by Dr. Icaza, this morning, because I discovered that I would have to use them by number, in order that the Court might check me.

371 It is a thing easy to find out when the Reporter goes to make his transcript. When the Reporter goes to make his transcript, there are the questions, by numbers, and he can check them over very easily. Because, they were asked, not in

regular order, but some were asked backward and forward, and the witnesses were testifying, but they are as I asked them.

Mr. Van Siclen:
For that reason, they should now be excluded; they are already in the record. Proctor for the Libelant has had all the opportunity in the world to discredit them on the stand and show their attitude. You have them there in the record now—the questions.

Mr. Carrington:
How could the Court check them if I don't put the record in?

The Court:
The main grounds of the objection are: First, that it is not proper rebuttal; and secondly, I think you said it was irrelevant and immaterial.

Mr. Van Siclen:
And incompetent.

The Court:
And incompetent. The Court holds that they are admissible merely for the purpose for which offered, namely, that of alleged impeachment, and on that ground the objections are overruled.

Mr. Carrington:
We now offer in evidence, for impeachment, questions No.—

The Court:
They have already been offered.

Mr. Carrington:
I have only offered part, and I now make the same offer on Questions Nos. 3, 4, 7 and 8 of page 13,

Questions Nos. 18, 19, 21, and 23 of page 14, Questions Nos. 27 and 28 of Page 15, and Questions No. 43 and 44 of Page 16 of the testimony of Thomas Inverdale given on August 1, 1930, in the Port Captain's Office in Balboa.

Mr. Van Siclen:
Same objection.

The Court:
The same ruling. The Reporter will be directed to copy from that Exhibit the questions and answers which have been specified and to file them. The Court does not want the entire document.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. The only way that you know those questions were asked and answered is now by reason of reading them. Is that correct?

A. I can recall many of the questions that were asked.

Q. But you don't recall all of them, do you?

A. Not word for word. I recall, though, what happened at the meeting.

Q. Why do you so distinctly recall certain questions and not others?

A. I did not state that I recall some and not others.

Q. Do you recall all of those questions that were asked Mr. Ekstrand?

A. In general; I recall what happened; yes.

Q. Do you recall what question No. 3 was,
372 that you stated you did?

Mr. Carrington:
That question is objected to. The witness was offered a document, and unless it is shown to him, or

read to him, he can't remember what Question No. 3 is; there are several numbered 3.

The Court:

The witness said he recalled, generally. Overruled.

A. I could not tell the answer to the question or what question No. 3 is, or No. 4. I stated that, in general, I recalled what happened at the investigation.

Q. You recall that some questions were asked, do you not?

A. And that answers were given.

Q. And that answers were given. But whether those were the answers or were not, you do not know from your own memory.

A. Yes; I do; when I see the question that's asked. If you ask the question I will know about what the witness answered.

Q. In the case of Ekstrand: When you asked him —Did you ask these questions?

A. I asked some of the questions; some of the questions were asked by Mr. Elliot and some by Mr. Lombard; the questions for the Board were asked by me.

Q. In the case of Question No. 18 of Page 3, Ekstrand's testimony, the question was asked: "When you saw there was danger of collision, did you stop or back your engine?" Do you recall what his answer was?

A. His answer was something to the effect that he did not have time to back his engine.

Q. That he did not have time. You, of course, now rely on general recollection?

A. Absolutely; I have no record.

Q. If I was to say that the answer was this: "Was this after the accident?" would that help your memory any?

A. He may have said that, in order to clear up the question. I couldn' tell exactly the answer to any question.

Q. If I said he said "I stopped as soon as possible and backed it up. When I heard he was taking water I told him to give me a line and I would tow him to shallow water."

Mr. Carrington:

This is not fair to the witness. This is a record and it has to be shown to a witness to have his memory refreshed. It is not permitted in a Court like this to go and pick out any particular question and ask him what was done, unless he sees it.

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The Court:

The witness said he could remember, generally, what went on and there wasn't any objection made to that, and the minute he said that he laid himself open to see if he could remember.

Mr. Carrington:

He has said—

The Court:

That was in cross-examination, without any objection at all by you.

Mr. Carrington:

I can stop him, whenever I think he should be stopped. Suppose I permit an irrelevant question to go in for my purpose, does that mean I cannot object to other irrelevant questions?

The Court:

Your objection is not timely now; it is overruled.

Mr. Van Siclen:

We can go on indefinitely the way we are going.

The Court:

The Court has got to decide the case, and what we must rely upon is the records for what might or might not have happened at a hearing. A person might generally know, but he cannot tell what the specific questions or answers were. I simply allowed this to go on as a demonstration—a perfect demonstration—of the caution which must be used in the matter of raising objections and also in the matter of statements made by the witnesses.

(Witness excused.)

ROBERT PITT MORGAN was called as a witness, in rebuttal, by the Libelant, and, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. State your name.

A. Robert Pitt Morgan.

Q. And how are you occupied?

A. I am foreman—outside foreman machinist,—for the Mechanical Division, Balboa.

Q. How long have you been machinist foreman, Balboa?

A. Do you mean on The Panama Canal?

Q. Yes.

A. Since January, 1909.

Q. During that period of time have you had to do with barges and their repairs, etc.?

A. Yes, sir.

Q. Do you know a certain barge, No. 4584, owned by Mr. Thomas Lombard that was transporting sand from Agua Dulce to Balboa Harbor?

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A. Yes, sir.

Q. From the Channel to Balboa Harbor. Did you see that barge?

A. Yes, sir.

Q. When was the first time you saw that barge?

A. The first time I saw that barge, to the be of my recollection was when—I may have seen it at some other time and not notice it—but the first I have any recollection of it was the time was the time they brought it in to have dredging machinery installed in it.

Q. Did you install dredging machinery?

A. I supervised it; yes, sir.

Q. You have been in the practice of that work for about how long—installing machinery in dredges?

A. On The Panama Canal 23 years.

Q. And as such installing foreman, you are familiar with the prices and values of machinery, are you not?

A. I have worked on specifications for various machinery for bids for the Government; I have some idea of what machinery costs; yes, sir.

Q. How long before July 31, 1930, had you seen the barge for the last time?

A. Oh, probably 2 or 3 weeks prior to that.

Q. From your experience as a master foreman installing machinery into barges, what was the value of the barge at the time you saw it last—a fair market value of the barge?

A. Do you mean what would it cost to go out in the market here and procure another barge similiar to that?

Q. I mean what that particular barge was, in your opinion, worth, at the last time you saw it, taking into consideration its machinery, its condition, and any other improvements that you may have seen on her.

A. I happen to know there had been a good deal of work done making a dredge out of that barge, because I had looked after that work. I would imagine between $12,000 and $16,000, probably.

Q. Are barges easily obtained here, by private individuals?

A. I have never tried to obtain one, but I haven't seen any around that looked like they were on the market.

Q. Do you know for what purpose the
375 barge was used?

A. Yes, sir.

Q. Was it in good condition for the purpose for which it was used?

A. It was all right for that purpose; yes.

Q. Did you notice the bottom of the barge, how it was constructed, while it was down there?

A. I never saw the barge, as I said before, until it was brought in there to have the machinery installed. The barge you could see from the water outside, or down below in the bottom, appeared to be all right so far as I could see.

Q. What kind of a bottom did it have?

A. A concrete bottom—cement of some kind.

Q. And you say that a fair market value of the barge at the time, considering the purposes for which it was used, was between $12,000 and $16,000?

A. Yes; I couldn't think of going out and buying a barge like that new for anything like that money at all.

Q. What, in your opinion, would a new barge cost?

A. $40,000.00.

Q. A new one?

A. Yes.

Q. Equipped as this barge was equipped?

A. Yes, sir.

Q. Were the sides of the hull of the barge and the deck in good condition?

A. The barge was painted black and, apparently, had been scaled, as I remember, and I remember seeing nothing about it that looked as if it was in bad condition at all; that is, from what I could see.

Q. And you supervised the work on it for several days, installing machinery, did you not?

A. Yes, sir.

Cross Examination.

(Questions by Mr. Van Siclen):

Q. Did you say you are a machinist?

A. Yes, I am a machinist; I didn't say it; I am, incidentally.

Q. You are not sent on estimates of hull work, are you?

A. No.

Q. That belongs to the craft of shipfitters?

A. Yes.

376 Q. How did you arrive at the value of $16,000—$15,000 or $16,000,—as being the value of the barge?

A. As I was asked what I imagined I could go out and procure a similar equipment for of dredging barge; that was what I was trying to answer.

Q. Then your answer was solely your imagination?

A. Why, yes.

Q. And to really know the worth of the barge under discussion, it would be necessary to go and make a proper examination of it, would it not?

A. You mean put it in dry dock, or something like that?

Q. Not an examination in dry dock, but to ascertain the condition of its hull plates and frames and tie rods, etc. Would it not be necessary to make an ocular inspection?

A. No; not necessarily; I was merely estimating on what you could go out and get a similar piece of equipment for.

Q. Did you ever try to obtain any equipment of that kind?

A. No; not here; I have kept the costs on various scows, though, being built; I can estimate fairly closely on what it would cost to build this scow.

Q. Do you recall the construction of this barge? This was a barge?

A. It is like what I call a lighter.

Q. Double ended?

A. Yes, sir; rudder on one end.

Q. With lock plates? Were the plates welded, or how?

A. Riveted plates.

Q. Lapped?

A. Lapped; riveted.

Q. And the plates were all in sound condition?

A. I didn't examine the plates. It became necessary to drill through the plates in various places where we had to shore the timbers that supported the pumps, and that is how I came—that's the only work that I had done where I came in contact with the plates in any way.

Re-Direct Examination.

(Questions by Mr. Carrington):

Q. You said you drilled holes in these plates?

A. Yes.

Q. And the plates were in good condition where you drilled the holes?

377 A. Where the timbers butted against the ship's side we put angle brackets there to support the timber, and I remember the men drilling through the shell there—just about the same as any other scow you drill.

(Witness excused.)

CAPT. MARCEL MARTIN was recalled as a witness, in rebuttal, by the Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):

Q. On the morning of July 31, 1930, did the Lucky Girl pass abreast of the Dredge Las Cruces?

A. No, sir.

Q. And did the Lucky Girl at the time that you blew whistles go outside the channel?
A. Yes; she was laying outside the channel.
Q. And you saw her go out?
A. Yes.

Mr. Van Siclen:
He has already testified to those very questions.

The Court:
What is your objection?

Mr. Van Siclen:
Not proper rebuttal.

The Court:
Sustained.

Mr. Carrington:
The testimony is she didn't go out.

The Court:
The burden was upon you to prove your case at that time. This is not rebuttal. Sustained.

(Witness excused.)

FENUEL SMITH was recalled as a witness, in rebuttal, by the Libelant, and testified as follows:

Direct Examination.

(Questions by Mr. Carrington):
Q. On the morning of July 31, 1930, at the time of the accident, did you at that time make a statement to the Master of the Real that you always kept on the left side of the channel in coming in?
A. No, sir.

Q. Did you at any time go into the center of the channel after you passed the Tug Chagres, with its tow?

A. When the channel was clear?

(The Reporter read the previous question.)

A. No.

378 Mr. Van Siclen:

I raise the same objection. This is not proper rebuttal. He has testified to these very things, and we have had our turn. It is not rebuttal of anything.

The Court:

I don't quite get it. My thought is that this witness testified as to where he was and what he did, and defendant came along and testified as to where he was and what he did.

Mr. Carrington:

The man testified he was in the center of the channel. Am I not permitted to rebut what the defendant says?

The Court:

Why, if he raises any new matter you may,—matter which has not been raised in the original case. We have to be clear about this. Is it not a fact that your testimony showed, on the main case exactly where he said he was and all about it?

Mr. Carrington:

Yes.

The Court:

And then the respondents came in and said he was somewhere else?

Mr. Carrington:
Yes.

The Court:
The issues are made; there is nothing new about that. You have presented your case and he denies it. Rebuttal is only for the purpose of rebutting anything new that comes up anything new in the testimony that was not properly before the Court in the original case.

Mr. Carrington:
If Your Honor please, that is something new, to me. I may be all wrong about it. But, if the burden, as you state, is on the Libelant and he makes a statement that he was in such a position and then the defendant goes on the witness stand and says no, he passed him somewhere else, haven't I got to deny that he was there?

The Court:
No; you have already denied it when you started. You stated you were in a certain part of the Canal and the defendant comes in and says you were somewhere else. The objection is sustained.

Mr. Carrington:
Exception noted.

Q. After the collision did the Real attach a line to the scow or barge and tow it outside of the channel?

Mr. Van Siclen:
I object, for the same reason. He has already said that it did put a line onto the vessel.

Mr. Carrington:
The record does not show that—that he had a line attached to the vessel. I think the records show differently.

The Court:
The Libelant's case was that somebody threw somebody a line. Is that right?

379 Mr. Carrington:
Yes, sir.

The Court:
And the Libelant's case was that in 5 seconds or 10 seconds, or something less than 3 minutes anyhow, the ship was sunk the barge was sunk, and then along comes the defendant and says no, we pushed it over 3 minutes 5 minutes, I think. I think the issues are all raised on that.

(Witness excused.)

Mr. Carrington:
The Libelant rests.

Mr. Van Siclen:
I will call one witness in regard to this new barge.

ESTEBAN PERALTA was called as a witness, in sur-rebuttal, by the Respondents and Cross-Libelant, and having been first duly sworn, (through the Interpreter), testified as follows:

Direct Examination.

(Questions by Mr. Van Siclen):
Q. What is your name?
A. Esteban Peralta.
Q. What do you do for a livelihood?
A. Operator of a launch.
Q. Do you know Mr. Lombard, the Libelant?
A. Yes, sir; I know him.

Q. Did you work for Mr. Lombard?
A. Yes, sir; with the Lucky Girl and a lighter.
Q. Did you operate the Lucky Girl?
A. Yes, sir.
Q. When did you leave the Lucky Girl?

Mr. Carrington:
Objected to as irrelevant, incompetent, and immaterial, and not proper sur-rebuttal.

The Court:
Sustained.

Mr. Van Siclen:
I am laying a foundation.

The Court:
The foundation you are laying—

Q. Did you ever tow a sand barge No. 4584 with the Lucky Girl?

Mr. Carrington:
Objected to; not proper sur rebuttal.

The Court:
Sustained.

Q. Do you know Barge No. 4584 that Mr. Lombard used for carrying sand prior to July 31, 1930?

Mr. Carrington:
Objected to as not proper sur-rebuttal.

380 The Court:
Sustained.

Mr. Van Siclen:
On direct rebuttal this was brought out.

The Court:

I will tell you what happened: Practically every bit of the testimony of Mr. Morgan was improper rebuttal. It is the business of the Court to control a trial, and not Counsel. Counsel cannot make objections because he wants to make objections to go in —something by way of sur-rebuttal, which is practically all right. Practically all Mr. Morgan's testimony which came into the record came in as no proper rebuttal at all on the part of Libelant's case. Respondent sits quiet and does not object, so he can come in on sur-rebuttal. The objection being made, the objection is sustained.

(Witness excused.)

Court adjourned at 3:30 p. m.

I hereby certify that the foregoing 263 pages constitute a full true and complete transcript of the stenographic notes taken by me in the above-entitled cause.

In witness whereof I hereunto sign my name at Ancon, Canal Zone, this 17th day of August, 1931.

(Signed) R. S. CARTER.

(Copy.)

Filed Sept. 24, 1932, as of August 17, 1931.

381 LIBELANTS EX. No. 2.

(Exhibit 2 of Libelant.)

1929.		Cost of Barge:			
Dec.	4	Check #1	200.00		
	10	Check #5	1,800.00	2,000.00	2,000.00

		Cost of improvements to barge:		
Dec.	9	Wire for reinforcing, ck. 4	17.85	
	10	Duty on wire ck. 6	3.42	21.27
	20	Plans for foundation, ck. 12		30.00
1930.				
Jan.	2	Materials for painting barge, ck. 18		22.43
	8	Towing barge, ck. 24..		5.00
	10	Lumber for barge, ck. 25		239.58
	30	Labor—P. R. distribution		548.00
Feb.	10	Pipe—ck. 55		17.65
	24	Material—P. Canal ...		4.76
	25	Hand bilge pump, ck. 74		33.50
	28	Labor—P. R. distribution		200.00
Mar.	22	Labor—ck. 89		69.00
	28	Labor—ck. 96		31.00
Apr.	10	Hauling materials, ck. 110		7.50
	10	Hauling materials, ck. 111		47.75
May	12	Materials, ck. 126		22.75
June	11	Life Preservers—ck. 166		17.50
	12	Lumber—ck. 168		26.32
July	5	Lumber—ck. 194		193.90
	21	Hardware—ck. 222 ...		6.80
		Voucher 263 ...	58.85	
			55.55	114.40
		Bill from Panama Canal	931.49	2,590.60
		Total cost of barge		4,590.60
382				4,590.60

		Cost of Pumps:		
Feb.	1	Invoice Ellicott Mch. Corp.	5,134.00	
	5	Freight charges as per B/L	10.50	
	17	R. G. de Paredes, ck. 66	123.33	
	21	2nd hand parts, ck. 70.	40.00	
	25	R. G. de Paredes, ck. 73	1.46	
	28	Nat'l. City Bank (exchange) ck. 77	3.41	
Apr.	9	R. G. de Paredes, ck. 108	49.59	
July	30	R. G. de Paredes, ck. 229	9.40	
		Total cost of pumps		5,371.69
		Total cost of barge with pumps.		9,962.29
		Cargo of sand lost with barge, 85 cu. yds. at 1.50.....		127.50
		Cost of Salvageing Operations:		
Aug.	19	199—Food & supplies for tug	50.00	
		Ck. 246—25.00—Aug. 18		
		Ck. 247—25.00—Aug. 19		
	29	209—Food for tug	15.00	
		Ck. 258—Aug. 29.		
	30	210—50% of Payroll for month of August, 1930	141.92	
	30	213 — Panama Canal bills. 460.30		
		Less #C A 502 5.12	455.18	
		Total cost salvage Op.		662.10

Loss of Profit—		
Total income for period from May 24, 1930, to July 31, 1930	4,304.25	
Operating Expense for same period—69 days	2,269.20	
	2,035.05	
Based on the above, the profit for the 83 days from Aug. 1, 1930, to Oct. 22, 1930, would have been		2,447.96
Total cost of accident		13,199.85

CLERK'S CERTIFICATE.

United States of America,
Canal Zone, ss.

I, F. H. SHEIBLEY, Clerk, of the United States District Court in and for the Canal Zone, do hereby certify that the annexed and foregoing, pages numbered 1 to 383, both inclusive, is a true and faithful copy of the record and proceedings of said Court in the case of Thomas R. Lombard, Libelant, versus The Motor Ship Real, her engines, boats, boilers, tackle, apparel, furniture, etc., etc., and Hans Elliot, owner of said Motor ship Real, Respondents,—and Hans Elliot, Cross-Libelant, versus The Motor Vessel Lucky Girl, her engines, boats, tackle, apparel, furniture, etc., Respondent, No. 1028 in Admiralty, made up pursuant to Rule No. 49 of the United States Supreme Court, and as per praecipe filed, a copy of which is hereto attached.

And I further certify that in obedience to order of Court, exhibits of Libelant numbered 1, 3, 5, 7, 9, 10, 11, 12 and 13-1, and exhibits of Respondents, Cross-Libelant, lettered A, B, C, D, E, F, G and H, accompany this transcript in the original.

And I further certify that the Citation on Appeal with service indorsed thereon also accompanies this transcript in the original.

In testimony whereof I hereunto subscribe my name and affix the seal of the said District Court at Ancon, Canal Zone, this seventh day of October in the year of our Lord One Thousand Nine Hundred and Thirty-two, and in the One Hundred and Fifty-seventh year of the Independence of the United States.

F. H. SHEIBLEY,

(Seal) Clerk.

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 6816

HANS ELLIOT, Claimant, Appellant,

versus

THOMAS R. LOMBARD, Appellee

MOTION OF APPELLEE TO DISMISS—Filed April 19, 1933

Comes now Thomas R. Lombard, appellee in the above entitled and numbered cause, and respectfully moves this Honorable Court to dismiss the appeal in said case and for grounds of said motion specifies and assigns the following, to-wit:

I

This Court is without jurisdiction to entertain this appeal because the necessary parties to give the Court jurisdiction are not made parties to the appeal.

II

It appears from the transcript of record, P. 20-21, that the United States Fidelity and Guaranty Company, corporate surety doing business in the Canal Zone, became stipulators and sureties on the release bond of the appellant in the penalty of $10,000 on the 13th day of August, 1930.

It further appears from the transcript, P. 98, that the decree was filed herein August 27, 1932, in favor of libelant and against respondent for the sum of $6,321.29 with interest thereon at the rate of 6% per annum from the 31st of July, 1930, together with libelant's costs, taxed in the sum of $117.20 with interest thereon until paid.

It was further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon respondent or his proctor, execution issue against Hans Elliot, respondent and the United States Fidelity and Guaranty Company, his stipulators, for costs and value, their goods, chattels and lands to satisfy this decree.

III

The record fails to show that the United States Fidelity and Guaranty Company were made a party to the appeal; it does not appear that the surety company was asked to join in the appeal; and the record fails to show that there has been any summons or severance issued herein.

IV

The record fails to show any return day for the appeal.

Wherefore, appellee prays that an appropriate order be entered by this Honorable Court, dismissing said appeal.

(Signed) Carlos Icaza, A. and L. S. Carrington,
P. M. Milner, Proctors for Libelant and Appellee.

To Messrs. Van Siclen and Boggs, Proctors for respondent and Cross-libelant, Ancon, Canal Zone.

You will please take notice that the foregoing and attached motion to dismiss the appeal has been filed in the above captioned and numbered cause and will be submitted and argued to the Court on Wednesday, April 26, 1933.

Dated at New Orleans, Louisiana, this 17th day of April, A. D. 1933.

P. M. Milner, Carlos Icaza, A. and L. S. Carrington,
Proctors for Libelant and Appellee.

I acknowledge receipt of copy of the foregoing motion.
New Orleans, La., April 18, 1933.

(S.) Merritt Barton.

In United States Circuit Court of Appeals, Fifth Circuit

[Title omitted]

Motion of Appellant for Leave to Amend—Filed April 22, 1933

Comes now the above named appellant, Hans Elliot, by his proctors William A. Van Siclen and Merritt Barton, and moves this Honorable Court for leave to amend the petition for appeal and the citation on appeal to show that the United States Fidelity and Guaranty Company joins

with the said Hans Elliot, as a party appellant. The grounds for this motion are as follows:

I

On or about August 13, 1930, the said United States Fidelity and Guaranty Company became stipulators for value with the said Hans Elliot on a release bond in a cause in Admiralty wherein the above named Thomas R. Lombard, Appellee, was libelant and the above named Hans Elliot was claimant, and cross-libelant.

II

On August 27, 1932, a decree was filed in the District Court for the Canal Zone in favor of the libelant and against the said Hans Elliot as claimant, for the sum of $6,321.29 with interest from the 31st day of July, 1930, together with costs in the sum of $117.20.

It was further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within 10 days after service of a copy of this decree with notice of entry upon respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Company, his stipulators, for costs and value, their goods, chattels and lands to satisfy this decree.

III

Thereafter, the said Hans Elliot duly perfected his appeal to this Honorable Court.

IV

The United States Fidelity and Guaranty Company has appeared in this cause and moved this Honorable Court to be made a party Appellant and to join with the said Hans Elliot in the prosecution of this appeal.

Wherefore, the appellant, Hans Elliot, prays that an order be entered, permitting the amendment of the petition for appeal and the citation on appeal and other parts of the record necessary to show that the United States Fidelity and Guaranty Company joins with the said Hans Elliot in this appeal.

(Signed) Wm. A. Van Siclen, Merritt Barton,
Proctors for Claimant-Appellant.

To Messrs. P. M. Milner, Carlos Icasza, A. & L. S. Carrington, Proctors for Libelant and Appellee.

Please take notice that the foregoing and attached motion on the part of the appellant, Hans Elliot, for leave to amend has been filed in the above-entitled cause and will be submitted and argued to the Court on Wednesday, April 26, 1933.

Dated at New Orleans, Louisiana, this — day of April, A. D. 1933.

(Signed) Wm. A. Van Sicken, Merrift Barton, Proctors for Claimant-Appellant.

Receipt of copy of foregoing and attached motion and notice pertaining thereto are hereby acknowledged on this — day of April, A. D. 1933.

——, Proctors for Libelant-Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

MOTION OF UNITED STATES FIDELITY & GUARANTY COMPANY FOR LEAVE TO JOIN APPELLANT—Filed April 22, 1933

Comes now the United States Fidelity and Guaranty Company, by its attorney, J. Zach. Spearing, and appearing generally in the above-entitled cause, expressly waiving issuance and service upon it of any citation in this cause, moves this Honorable Court for leave to join with the appellant, Hans Elliot, in prosecuting this appeal, and in support of its motion shows unto this Honorable Court, as follows:

I

That the United States Fidelity and Guaranty Company is a corporation, existing under and by virtue of the Laws of Maryland, and authorized to do business in the Canal Zone.

II

That on August 13, 1930, it entered into a bond or stipulation in the sum of the Ten Thousand Dollars ($10,000.00)

whereon Hans Elliot, claimant of the Motorship Real was also stipulator, conditioned to pay the money awarded by any final decree.

III

That on August 29, 1932, a decree was filed in the District Court for the Canal Zone, in favor of libelant, Thomas R. Lombard and against Hans Elliot, for the sum of Sixty Three Hundred and Twenty-One Dollars and Twenty Nine Cents (($6,321.29) with interest thereon from the thirty-first day of July, 1930, and costs in the sum of One Hundred and Seventeen Dollars and Twenty Cents ($117.20). It was further decreed that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Company, his stipulators for costs and value, their goods, chattels and lands to satisfy this decree.

IV

That because of the said decree, it has an interest in common with the appellant, Hans Elliot, in prosecuting the appeal had in this cause.

Wherefore, the United States Fidelity and Guaranty Company prays that it be made a party appellant in this cause; that it be allowed to join with the appellant, Hans Elliot, in prosecuting this appeal; that it be allowed to adopt as its own the petition, citation, assignments of errors and all other acts of the said Hans Elliot done in perfecting the said appeal.

(Signed) J. Zach. Spearing, Proctor for United States Fidelity and Guaranty Co.

To Messrs. P. M. Milner, Carlos Icasza, A. and L. S. Carrington, Proctors for Libelant and Appellee.

Please take notice that the foregoing and attached motion on the part of the United States Fidelity and Guaranty Company to be made a part of appellant has been filed in the above-entitled cause and will be submitted and argued to the Court *and argued to the Court* on Wednesday, April 26, 1933.

Dated at New Orleans, Louisiana, this 20th day of April, A. D. 1933.

(Signed) J. Zach. Spearing, Proctor for U. S. Fidelity and Guaranty Company.

Receipt of copy of foregoing and attached motion and notice pertaining thereto are hereby acknowledged on this day of April, A. D. 1933.

, Proctor for Libellant Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

EXCEPTION OF APPELLEE TO MOTION OF UNITED STATES FIDELITY & GUARANTY COMPANY TO BE MADE A PARTY APPELLANT. Filed April 24, 1933.

Comes now Thomas R. Lombard, appellee, and objects to the filing and consideration of the motion for leave to join appellant and to be made a party to this appeal by first appearance in this Honorable Court, and for cause of objection says:

That the Supreme Court of the United States in the case of Z. N. Estis, surviving partner of the firm of Estis, Doan and Company, plaintiff in error, v. Trabue, Davis and Co., defendant in error, 128 U. D. 437, in considering the necessity for making sureties on forthcoming bonds parties to the appeal or Writ of Error or in lieu thereof, seeking summons and severance in the case, held:

That while under Section 1005 of the Revised Statutes, being Section 3 of Act of June 1, 1872, Chapter 255, 17 Stat. at L. 196, provision was made for amendment to a Writ of Error, wherein the statement of the title of the action or parties thereto in the Writ was defective, yet no provision was made under said Section in relation to an amendment in the appellate Court by which sureties on a forthcoming bond, not having been made parties, are joined in the appeal, and where no summons or severance was allowed, could be allowed in the appellate Court.

The Court said:

"There is nothing distributive in the judgment so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on the failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a Writ of Error. Ex parte Sawyer, 88 U. S. 21, Wall. 235, 240 (22 617, 619)."

The Court continued:

"It is well settled that all the parties against whom a judgment of this kind is entered must join in the Writ of Error, if any one defendant takes out such a Writ; or else there must be a proper summons and severance in order to allow of the prosecution of the Writ by not less than the whole number of the defendants against whom the judgment is entered. 24 U. S., 11 Wheat. 414, and numerous cases."

The Court concluded:

"Where there is a substantial defect in the Writ of Error, which this Court cannot amend, it has no jurisdiction to try the case. Wilson vs. Life and Fire Ins. Co. of N. Y. 37 U. S. 12, Peters 140 (9 L. Ed. 1032).

It will then, of its own motion, dismiss the case without awaiting the action of the party. Hilton vs. Dickinson, 108 U. S. 165, 168 (27 L. Ed. 688-89)."

Wherefore, appellant prays that the motion on the part of Hans Elliot, claimant and appellant; to permit the amendment of petition of appeal and now citation on the absent parties, be rejected and refused; and likewise that the motion on behalf of the United States Fidelity & Guaranty Company, surety on the forthcoming bond, to join in this appeal, be rejected and this appeal dismissed.

Carlos Icasza, L. S. Carrington, P. M. Milner, Proctors for Appellee.

To Messrs. Wm. A. Van Sicklen, Merritt Barton, Proctors for Claimant Appellant.

(Signed) J. Zack Spearing.

Please take notice that the foregoing and attached exception on the part of the appellee, Thomas R. Lombard, to motion of United States Fidelity and Guaranty Company to be made a party to this appeal has been filed in the above entitled cause and will be submitted and argued to the Court on Wednesday, April 26, 1933.

Dated at New Orleans, Louisiana, this 24th day of April, A. D. 1933.

(Signed) Carlos Ieaza, L. S. Carrington, P. M. Milner, Proctors for Appellee.

Receipt of copy of forogoing and attached motion and notice thereto are hereby acknowledged on this — day of April, 1933.

(Signed) Merritt Barton, Proctors for Claimant Appellant.

Minute entry of argument and submission, April 26, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6816

HANS ELLIOT, Claimant, Appellant,

versus

THOMAS R. LOMBARD, Appellee

Appeal from the District Court of the United States for the Canal Zone

(August 4, 1933)

Before Bryan, Foster, and Sibley, Circuit Judges

OPINION OF THE COURT—Filed August 4, 1933

FOSTER, Circuit Judge:

Lombard, owner of the motor ship "Lucky Girl" and a sand barge, filed a libel in rem against the motor ship

"Real" and in personam against her owner, Elliot, to recover damages for a collision between the said vessels. The Real was seized under admiralty process, was claimed by Elliott as owner and was released on a stipulation with the United States Fidelity & Guaranty Company as surety. The condition of stipulation was as follows:

"Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Vansiclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void otherwise to remain in full force and virtue."

Thereafter Elliot filed an answer and a cross libel in rem against the "Lucky Girl" and she was released on conditions similar to those above set out and upon which the United States Fidelity & Guaranty Co. was also surety. Testimony was taken before the judge in open court and a final decree was entered on August 27, 1932, the material part of which is in the following words and figures:

"Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further.

"Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliott, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

"Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libellant's costs."

On April 19, 1933, shortly before the hearing in this court, Lombard, appellee, filed a motion to dismiss the appeal on the ground that the surety company was not made a party to the appeal, was not asked to join in the appeal and there had been no summons or severance. On April 22, 1933, the United States Fidelity & Guaranty Co., the surety on the stipulation, filed a motion in this court to join with Elliot in prosecuting the appeal, expressly waiving issuance and service of citation. At the same time Elliot moved for leave to amend his appeal to include the surety company as a party appellant.

On questions presented by the above motions, the decisions are not harmonious, particularly with regard to admiralty stipulations for the release of vessels. It is settled by a long line of decisions that if a joint judgment is rendered all the parties must join in the appeal or there must be a summons and severance or notice equivalent thereto or an appeal by one party will be dismissed. In the case of The Bylands; 231 Fed. 101, we held that the surety on a release bond in admiralty was a necessary party to the appeal and, the surety not having appealed, there being no summons and severance or notice equivalent, the appeal was dismissed. In that case certiorari was denied, 241 U. S. 679. In the case of The Mary B. Curtis, 250 Fed. 9, we adhered to the ruling in the Bylands that the surety was an indispensable party but, after an extensive review of the authorities, granted a motion on behalf of the surety to be made a party to the appeal and overruled a motion to dismiss. In the case of The Glide, 72 Fed. 200 (4th Circuit), where the judgment was joint in form, it was held that the stipulators on a release bond were not parties to the case, although bound by the result, and not necessary parties to the appeal. A similar ruling was made in the case of The New York, 104 Fed. 561, (6th Circuit), and in the case of Munson S. S. Line vs. Miramar S. S. Co., 167 Fed. 961, (2nd Circuit) the same ruling was had, apparently on the ground that the trial was de novo in the appellate court where the whole case was open. However, in the recent case of Hartford Accident & Indemnity Co. vs. Bunn, 285 U. S. 169, where a joint judgment was rendered by the Supreme Court of Mississippi against appellant and the surety on the appeal bond, it was held, after an extensive review of the authorities, that the surety was an indispensable party to

a writ of error to the Supreme Court and a motion to join in the appeal, made after the time for appeal had expired, came too late and could not be entertained. In that case the decision in The New York, 104 Fed. 561, which is typical of that line of cases, was expressly disapproved.

Whether a judgment is joint depends on substance rather than form. The test is whether the same relief is granted against all the parties. Freeman on Judgments (5th Ed.) § 100. Compare Hampton vs. Rouse, 13 Wall. 187; Simpson vs. Greeley, 20 Wall. 152; Hanrick vs. Patrick, 119 U. S. 156; Ex Parte Sawyer, 21 Wall. 235. A stipulation to release a vessel seized under admiralty process is statutory. R. S. 941 (28 U. S. C. A. § 754). This statute provides that judgment thereon against both principal and surety may be recovered at the time of rendering the decree in the original cause. When such a bond is given it is a substitute for the vessel. Gray vs. Hopkins-Carter Hardware Co., 32 Fed. (2d) 876. A final judgment could have been rendered against the principal and surety on the stipulation in this case. The Belgenland, 108 U. S. 153. It is erroneous to say that the surety on a release bond in admiralty is not a party to the suit, although in the usual procedure he takes no part in the conduct of the case. The judgment in the instant case is somewhat ambiguous in that it decrees that the libellant recover from the respondent and that paragraph is silent as to the surety. But the intention of the court is made certain by the succeeding paragraph which orders execution to issue against both the respondent and the surety on the stipulation without the necessity of any further proceeding. Of course, execution may be suspended pending any appeal and if the respondent should pay the judgment there would be no liability on the surety. But in the contingency that the judgment would not be paid, and no appeal was taken by the principal or upon an affirmance by this court, the libellant was at liberty to proceed to collect his judgment from the surety alone. The judgment was final and the liability of the surety was not contingent. The interests of the principal and surety in the judgment were identical. It follows that the judgment appealed from was joint and the surety was an indispensable party to the appeal. There was no summons and severance or equivalent proceeding. The motions to make the surety a party to the appeal came too late, as the time for appealing had long since expired.

The case of ex parte Sawyer, 21 Wall. 235, has been cited as contrary to the above conclusions as to the necessity of the surety joining in the appeal. While that case was in admiralty it appears from the statement of the case that the libel was in personam. Therefore, the bond given on appeal from the District to the Circuit Court did not take the place of the vessel. We do not consider that case in point.

Appeal Dismissed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed Aug. 4, 1933

SIBLEY, Circuit Judge, Dissenting:

By the Act of March 3rd, 1803, R. S. § 1012, appeals to the Supreme Court were made subject to the same rules, regulations and restrictions as are or may be prescribed for writs of error. The uniformity fixed by the Act of 1803 was held to extend to the common law rules as to joinder of parties. Owings vs. Kincannon, 7 Pet. 399; Clifton vs. Sheldon, 23 How. 481; Masterson vs. Herndon, 10 Wall. 416; The Protector, 11 Wall. 82. A like provision appears in 28 U. S. C. A., § 880, as applying to all appeals from the District Court and in § 2 of the Act of January 31st, 1928, 28 U. S. C. A., § 861 (b). No doubt an appeal in admiralty to the Circuit Court of Appeals falls under the common law rules for writs of error under these latter statutes. Accordingly Hartford Accident Co. vs. Bunn, 285 U. S. 169, is controlling authority in the case at bar. That case settles that United States Fidelity & Guaranty Company cannot be made a coappellant now, after the time for appeal has expired, if it should have joined in the appeal originally. It does not hold that the surety on a bond to pay the final judgment is always a necessary party to an appeal from a judgment which would have been final but for the appeal. The weight of authority is to the contrary. Ex parte Sawyer, 21 Wall. 236; Evans vs. Cheyenne Co., 20 Wyo. 188; Ann. Cas. 1914D, page 1116, and note; Thomas vs. Price, 88 Ga. 533; Holliday vs. Wright, 43 Fla. 46; The Glide, 72 Fed. 200; The New York, 104 Fed. 561. But it does hold, following Estis vs. Trahne, 128 U. S. 225, that if the judgment appealed from is on its face a joint one against the surety,

he must join and the court will not look beyond the face of the judgment to see what sort of a surety he really was. To me this decree seems on its face evidently not joint, but that the only effective parts of it are against Elliott alone, the respondent below. There are three distinct judgments in separate paragraphs. The first is: "Ordered, adjudged and decreed that the libellant do have and recover of the respondent" certain sums. This is the decree in the original cause. The surety, United States Fidelity & Guaranty Company, is not mentioned in it. The second is:

> "It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a notice of entry upon the respondent or his proctor, execution issue against Hans Elliott, respondent, and United States Fidelity & Guaranty Company, his stipulators * * * to satisfy this decree."

This is the summary judgment on the stipulation which by the provision of 28 U. S. C. A., § 754, "may be recovered at the time of rendering the decree in the original cause." It is not the same thing as the decree in the original cause, though often included in it, but is an additional judgment on the stipulation, gotten against the parties to it without additional proceedings therefor. The third judgment is: "Ordered, adjudged and decreed that the cross-bill be dismissed." United States Fidelity & Guaranty Company is a party to the second of these judgments only, and that judgment is but provisional. For it to be made operative there must be proof of service of a notice on the respondent or his proctors of the rendition of the first judgment and proof of the lapse of ten days thereafter without payment or appeal, consideration of which would perhaps require further judicial action. But in fact there was an appeal within ten days, so that by its own terms this judgment never became operative. There was nothing for the United States Fidelity & Guaranty Company to appeal from. It was not, however, discharged from its stipulation, for if its condition be looked to it shows an obligation to "pay the money awarded by the final decree rendered by the court or the appellate court if any appeal intervenes." A summary judgment can be entered on the stipulation so soon as a truly final decree in the cause is had, although rendered

on a mandate from this court. A joint decree might have been made on the trial below, but it was not.

This case is not distinguishable from Ex Parte Sawyer, 21 Wall. 236. The stipulation there involved was one for an appeal from the District Court to the Circuit Court under R. S., § 1000; 28 U. S. C. A., § 869. Summary judgment can be entered thereon just as on a stipulation under 28 U. S. C. A., § 754; Pease vs. Rathbun-Jones Co., 243 U. S. 273, 278. A decree was rendered by the Circuit Court much like the one here, that is first, a judgment in the cause against the respondent alone, and second, "It is further ordered, adjudged and decreed that unless an appeal be taken from this decree within the time allowed by law" judgment be entered against respondent and his surety, with execution. An appeal was taken by the respondent alone. The decree was not considered to be a joint one. The Court says: "No decree was entered against them (the sureties) before the appeal. The order was that a judgment be taken if an appeal was not taken. The appeal was taken and therefore the order never became operative. * * * Here the decree was absolute against the principal respondents alone. The order against the sureties was provisional only. They could not appeal from it because it was not final." In the decree before us the order for a joint execution implies a joint judgment for it to issue on, but the implied judgment and the execution are subject to the condition that payment or appeal of the principal judgment does not occur within ten days. In Estis vs. Trabue, 128 U. S. 225, in holding the judgment there involved to be joint it was said: "There is nothing distributive in the judgment so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on failure to recover the amount from the claimants." In the present case we have a separate judgment against Elliot, and the judgment against United States Fidelity & Guaranty Company is enforceable only after failure for ten days after notice to get the money from Elliot. I think we ought to review the first and third judgments in the decree and ignore the second as not of force by its own terms.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6816

HANS ELLIOT, Claimant,

versus

THOMAS R. LOMBARD

JUDGMENT—August 4, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Canal Zone, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the appeal in this cause be, and the same is hereby, dismissed;

It is further ordered, adjudged and decreed that the appellant, Hans Elliot, Claimant, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Sibley, Circuit Judge, dissenting.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed August 14, 1933

Now come Hans Elliot, the claimant and appellant in the above entitled and numbered cause, through his attorneys William A. Van Siclen and Merritt Barton, His Proctors, and the United States Fidelity & Guaranty Company, through Spearing & McClendon, its attorneys in the above entitled and numbered cause, and shows to the court,

That it is the intention and desire of said Hans Elliot and the United States Fidelity & Guaranty Company to apply to the Supreme Court of the United States for a writ of certiorari to this Honorable Court, and that there does not exist sufficient time for that purpose before the expira-

tion of the delays for issuing the mandate to the District Court of the United States for the Canal Zone, from which this appeal was taken, and that, therefore, an additional delay say sixty (60) days from this date by reason of the distance from and slow means of communication with the place of residence of the claimant and appellant, is necessary.

Wherefore, Hans Elliot, claimant and appellant and the United States Fidelity & Guaranty Company pray that the mandate of this Honorable Court be stayed and withheld until the expiration of sixty (60) days from and after this date.

Dated August 14, 1933.

(Signed) Wm. A. Van Sicklen (JZS), Merritt Barton (JZS), Proctors of Hans Elliot, Claimant and Appellant. Spearing & McClendon, (Signed) J. Zach Spearing, Attorneys for the United States Fidelity & Guaranty Company.

In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted]

Order Staying Mandate—Filed Aug. 14, 1933

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court deny-

ing the writ, or upon the expiration of sixty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 14th day of August, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI — Filed November 6, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,066. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 463. Hans Elliot and United States Fidelity and Guaranty Company, Petitioners, vs. Thomas R. Lombard. Petition for a writ of certiorari and exhibit thereto. Filed September 19, 1933. File No. 463, O. T., 1933.

FILE COPY

SEP 19 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS BELOW,

vs.

THOMAS R. LOMBARD, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. ZACH. SPEARING,
Whitney Building, New Orleans, La.;
WM. A. VAN SICLEN, and
MERRITT BARTON,
Box 124, Ancon, Canal Zone,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS BELOW,

vs.

THOMAS R. LOMBARD, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

1. That Thomas R. Lombard, as owner of Sand Barge No. 4584, filed a libel *in rem* and *personam* in the United States District Court for the District of the Canal Zone on the 9th day of August, 1930, against the Motorship "REAL" and Hans Elliot, in a cause civil and maritime for damages

for a collision in the waters of the Canal Zone on the 31st day of July, 1930 (R. 3).

2. That thereafter, and on the 13th day of August, 1930, Hans Elliot claimed the said Motorship "REAL" (R. 19) and thereupon entered into a stipulation with the libelant for the release of said Motorship "REAL" (R. 19).

3. That, pursuant to such stipulation, Hans Elliot, your petitioner, executed a "Release Bond" in the sum of $10,000, whereon the United States Fidelity and Guaranty Company signed as surety (R. 20).

4. That trial of the matter was had on the 24th day of July, 1931, the Honorable James J. Lenihan, United States District Judge for the District of the Canal Zone, presiding (R. 62).

5. That on the 13th day of August, 1932, Judge Lenihan rendered his opinion and on the 27th day of August, 1932, entered a decree in favor of the libelant, Thomas R. Lombard, and against the claimant, Hans Elliot, awarding the libelant damages in the sum of $6,321.29 (R. 97). By such decree it was:

> (a) "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid;"
>
> (b) "Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree;"

(c) "Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs" (R. 98).

6. On the 10th of September, 1932, and within ten days from service of notice of the entry of the said decree, Hans Elliot, respondent, filed a petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, together with his assignment of errors (R. 99), which petition was allowed (R. 101).

7. The appeal to the United States Circuit Court of Appeals for the Fifth Circuit having been perfected, the appellee, Thomas R. Lombard, did, on the 19th day of April, 1933, file in the United States Circuit Court of Appeals for the Fifth Circuit a "Motion to Dismiss the Appeal" on the grounds that the United States Fidelity and Guaranty Company, surety upon claimant's release bond, had not been made a party to the appeal or that a severance had not been made (R. 477). No argument was had on such motion.

8. Thereafter, on April 22, 1933, the United States Fidelity and Guaranty Company, the surety on the release bond above mentioned, voluntarily appeared in the United States Circuit Court of Appeals for the Fifth Circuit and moved for leave to join with the appellant, Hans Elliot, in prosecuting the appeal, expressly waiving issuance and service of citation. At the same time, Hans Elliot moved for leave to amend his appeal to include the surety company as a party appellant. No argument was had on either of above motions.

9. On the 4th day of August, 1933, the said United States Circuit Court of Appeals for the Fifth Circuit entered a decree dismissing the appeal on the grounds that the failure of the surety on release bond to be made a party was fatal and required dismissal (R. 490). From such holding,

Judge Samuel H. Sibley dissented and rendered a separate opinion (R. 491).

10. By its decision, the United States Circuit Court of Appeals for the Fifth Circuit holds that in an admiralty appeal, sureties upon the bond for release of a vessel seized under libel are necessary parties to the appeal; that such sureties cannot be made parties of record even by appearing voluntarily after the time has expired for perfecting the appeal; that the judgment entered by the district court in the matter at bar was a joint judgment from the time of its rendition, against the surety equally as against Hans Elliot.

Reasons relied upon for granting petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit are as follows:

(A) The decision of said circuit court of appeals as to the necessity of sureties upon an admiralty stipulation being made parties to an appeal is in conflict with the decision of the Circuit Courts of Appeal for the Second, Fourth, Sixth and Ninth Circuits, on the same matter, in the cases of *The Lydia*, 1 Fed. (2) 18 (C. C. A. 2); *The Buckhannon*, 299 Fed. 519 (C. C. A. 2); *The Cartona*, 297 Fed. 827 (C. C. A. 2); *The Glide*, 72 Fed. 200 (C. C. A. 4); *The New York*, 104 Fed. 561 (C. C. A.); and *Perrian v. Pacific Coast Company*, 133 Fed. 140 (C. C. A. 9), and is a decision of an important question of general law.

(B) The decision of said circuit court of appeals denying the right of a surety to join voluntarily in an appeal prior to hearing in such court is in conflict with the weight of authority.

(C) The decision of said circuit court of appeals, holding that the decree entered by the district court was joint and

effective against the surety as of the date of its entry as it was against the appellant, is an erroneous decision of an important question of general law.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding such court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket: "No. 6816. Hans Elliot, Claimant, Appellant, *v.* Thomas R. Lombard, Appellee," to the end that this cause may be reviewed and determined by this Court as provided for by Section 347 of Title 28, U. S. C., Judicial Code Sec. 240 as amended, and that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and that such other and further relief be had as to this Court may seem proper.

Dated ——— , 1933.

HANS ELLIOT and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

By J. ZACH. SPEARING,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case was rendered on the 4th day of August, 1933 (R. 490).

II.

The date of the decree dismissing appeal, to be reviewed, is August 4, 1933 (R. 497).

III.

Jurisdiction.

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended (U. S. C., Title 28, Section 347) (Appendix 1), providing for petition for certiorari to circuit courts of appeal. Under the above law we invoke the jurisdiction of this Court on the ground that it is of great public importance to have the highest authority resolve the conflict now existing as to the necessity of sureties upon admiralty stipulation for the release of vessels seized under process, *in rem* being made parties to an appeal to the circuit court of appeals from the district court. It was held in this case by the United States Circuit Court of Appeals for the Fifth Circuit that such sureties were necessary parties to the appeal (R. 490), contrary to decisions rendered on the same questions by the Circuit Courts of Appeal of the Second, Fourth, Sixth and Ninth Circuits.

IV.

Statement of the Case.

This has already been stated in the preceding petition under "I" (pp. 1-4), which is hereby adopted and made a part of this brief.

V.

Specification of Errors.

1. The circuit court of appeals erred in holding that the United States Fidelity and Guaranty Company was a necessary party to the appeal.

2. The circuit court of appeals erred in refusing to allow the United States Fidelity and Guaranty Company to be made a party appellant upon its voluntary appearance in the appellate court, waiving the issuance and service of citation.

3. The circuit court of appeals erred in holding that the decree entered by the district court was joint and effective against the surety as of the date of its entry as it was against the appellant, Hans Elliot.

VI.

ARGUMENT.

Summary of Argument.

POINT A. We propose in Point A to discuss the conflicts existing between other circuits and authorities and the Fifth Circuit as to the necessity of sureties upon an admiralty release bond being made parties to an appeal.

POINT B. We propose in Point B to discuss the right of a surety to join voluntarily in an appeal even after the time for perfecting an appeal has expired.

Point C. We propose in Point C to discuss the effect of a decree such as was entered by the lower court in the instant matter, with special emphasis on its effect upon a surety prior to the time when by its terms such decree operates against a surety.

Point A.

Contracts. The Fifth Circuit Court of Appeals in the instant matter dismissed the appeal of Hans Elliot for the reason that the surety, United States Fidelity and Guaranty Company, was not made a party to the appeal, was not asked to join in the appeal, and there had been no summons or severance.

The court itself, speaking of the motion to dismiss, says:

> "On questions presented by the above motions the decisions are not harmonious, particularly with regard to admiralty stipulations for the release of vessels" (R. 492).

Benedict on Admiralty, Vol. 1, 5th ed., at page 642, states:

> "All parties against whom a decree is rendered should join in the appeal, or the record should show that those who have not joined have had notice of the taking of the appeal and have either refused or neglected to join. But sureties on a stipulation are not parties and need not join."

Cyclopedia of Federal Procedure, Section 2745, at page 159 of Vol. 6, states:

> "It being settled law that an admiralty appeal brings up the whole case *de novo*, vacating thereby the decree below, it is unnecessary that any but one party or claimant take an appeal, which operates for all, so that non-appearing parties are no longer bound by the decree below."

Vol. 1, *Corpus Juris*, 1346, Section 298, states:

> "Sureties appearing on the record may appeal, but they are not necessary parties to an appeal by a party to the record, unless some extraneous question arises involving their obligation on their bond or stipulation."

The Fifth Circuit stands alone in its requirement that the sureties upon a stipulation for the release of a vessel be made parties to an appeal.

> "Sureties on a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, filed his claim to her, and thence forward becomes a party to the record, and conducts and controls the defense. * * * But sureties in the stipulation do not become parties." *The Glide*, 72 Fed. 202 (C. C. A. 4.)
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> "Such a bond is not a mere personal security given to the plaintiff, but security given to the court. It is a pledge or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. Unless some extraneous question arises involving the scope or obligation of the sureties in such bond, they are not necessary parties to an appeal taken by any of the parties to the record." *The New York*, 104 Fed. 564 (C. C. A. 6.)
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> "Sureties to such a stipulation are not parties to the controversy. The claimant alone conducts and controls the defense." *Perrian* v. *Pacific Coast Co.*, 133 Fed. 142 (C. C. A. 9.)
>
> "The appearance of the stipulator as an intervenor cannot be recognized. The only difference in this regard between this case and that of *Paulsen* v. *The Cartona* (C. C. A. —) 297 Fed. 827, is that the stipulator himself was permitted to intervene in this cause, instead of those who had given cross-security to the stipulator. It is just as true in this instance as it

was in that of the case cited that the stipulator had no interest in the *res*, and therefore cannot be permitted to appear as an intervenor." *The Buckhannon*, 299 Fed. 519, at p. 520 (C. C. A. 2.) *The Lydia*, 1 Fed. (2) 18.

In the case of *The Lydia*, 1 Fed. (2) 18, p. 21 (C. C. A. 2), where a judgment in form similar to the one at bar was entered, the court denied the right of the stipulator to become a party.

Point B.

The appellate court refused to allow the United States Fidelity and Guaranty Company to be made a party to the appeal upon its voluntary appearance before the hearing, expressly waiving issuance and service of citation, and denied the motion of Hans Elliot to amend his appeal so as to make the Uinted States Fidelity and Guaranty Company a party to the appeal.

Such an amendment was allowed by this Honorable Court, without opinion, in the cases of *Inland & Seaboard Coasting Co.* v. *Tolson*, 136 U. S. 572, 34 L. Ed. 539; also in *Knickerbocker Life Insurance Company* v. *Pendleton*, 112 U. S. 696, at page 710, 28 L. Ed. 866.

> "It would appear to be settled that this court, under the provisions of Sec. 1005, Rev. St. U. S. (Appendix 2) above mentioned, has the power to allow an amendment such as the one moved for in this case, although thereby an additional party is inserted in the writ of error and the citation, and although at the time the amendment is allowed the period within which the writ of error should have been sued out from the original judgment has elapsed." *Gilbert* v. *Hopkins* (C. C. A. 4) 198 Fed. 849, at page 850.

A similar motion to amend by adding a co-defendant in error was granted and motion to dismiss denied without

discussion in *Rininger* v. *Puget Sound Electric Ry.* (C. C. A. 9), 220 Fed. 419.

Similar motions were granted by the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca*, 250 Fed. 19, and *The Mary B. Curtis*, 250 Fed. 9, and by the Circuit Court of Appeals for the Fourth Circuit in *Browning* v. *Boswell*, 209 Fed. 788 (C. C. A. 4), in which case the court said, after holding it had discretionary power to make the order for amendment, at page 791:

> "It is equally clear that in the present instance the discretion ought to be exercised and the motion granted. There has been no lack of diligence, but at most a misapprehension by counsel as to a question of practice, and the motion is made to meet the objection urged by the appellees that the appeal can not be prosecuted without citation of the creditors. The appellees will not be delayed or otherwise prejudiced and the bringing in of the creditors as parties to the appeal by issuing the citation to them will have the good effect of entirely eliminating from the record a serious technical question, and leaving the case to be decided on its merits."

Point C.

The circuit court held the judgment rendered in the district court to be joint.

As said by Judge Samuel H. Sibley in his dissenting opinion (R. 494-495), and which opinion we put forth in support of our petition:

> To me this decree seems on its face evidently not joint, but that the only effective parts of it are against Elliot alone, the respondent below. There are three distinct judgments in separate paragraphs. The first is: 'Ordered, adjudged and decreed that the libellant do have and recover of the respondent' certain sums. This is the decree in the original cause. The surety, United States Fidelity & Guaranty Company, is not

mentioned in it. The second is: 'It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and United States Fidelity and Guaranty Company, his stipulators * * * to satisfy this decree.' This is the summary judgment on the stipulation which by the provision of 28 U. S. C. A., Sec. 754, 'may be recovered at the time of rendering the decree in the original cause.' It is not the same thing as the decree in the original cause, though often included in it, but is an additional judgment on the stipulation, gotten against the parties to it without additional proceedings therefor. The third judgment is: 'Ordered, adjudged and decreed that the cross-bill be dismissed.' United States Fidelity & Guaranty Company is a party to the second of these judgments only, and that judgment is but provisional. For it to be made operative there must be proof of service of a notice on the respondent or his proctors of the rendition of the first judgment and proof of the lapse of ten days thereafter without payment or appeal, consideration of which would perhaps require further judicial action. But in fact there was an appeal within ten days, so that by its own terms this judgment never became operative. There was nothing for the United States Fidelity & Guaranty Company to appeal from. It was not, however, discharged from its stipulation, for if its condition be looked to it shows an obligation to 'pay the money awarded by the final decree rendered by the court of the appellate court if any appeal intervenes.' A summary judgment can be entered on the stipulation so soon as a truly final decree in the cause is had, although rendered on a mandate from this court. A joint decree might have been made on the trial below, but it was not."

"The condition of the appeal bond is that the appellants shall pay the damages and costs which shall be awarded against them by this court, as appellants, if they shall fail to make their appeal good. The appel-

lants are not under obligation to pay the sum awarded against them by the decree until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree. The obligations of the sureties being an obligation only that the appellants shall pay when obliged to pay, cannot be enforced against them in any manner, even to the extent of entry of judgment against them, until the obligations of the appellants to pay comes into force; and such obligation of the appellants does not, in a case like the present, where the appeal may be a supersedeas, come into force until the expiration of ten days after the rendering of the decree." The New Orleans, 18 Fed. Cas. No. 10,181, 17 Blatchford 216.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

J. ZACH. SPEARING,

Counsel for Petitioners.

WM. A. VAN SICLEN and MERRITT BARTON,

Of Counsel.

APPENDIX I.

SECTION 347. (Judicial Code, Section 240, amended.) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (*a*) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(*b*) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(*c*) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Section 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938.)

APPENDIX II.

SECTION 873. Amendment of writ of error. The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ

of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error (R. S. Section 1005).

FILE COPY

FEB 26 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 463

HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD,

Respondent.

BRIEF OF HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS.

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BRIEF OF HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS.

Opinions Below.

1. Opinion of District Court of United States for the Canal Zone—*not reported.* (R. 85). (This Brief, p. 4).

2. Opinion of United States Circuit Court of Appeals, Fifth Circuit, reported at *66 Fed. (2) 662.* (R. 484).

I.

Jurisdiction.

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, to be here reviewed, was rendered: August 4th, 1933. (R. 484).

The decree, dismissing the appeal, was rendered on August 4th, 1933 (R. 491).

(b) The claims advanced below by petitioners, appellants below, and the rulings made, were:

(1) That a surety on a release bond in an admiralty proceeding *in rem* is not a necessary party to an appeal by the claimant, and no summons nor severance is required.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(2) That a surety on a release bond in an admiralty proceeding *in rem*, has the right, by motion (R. 480), to voluntarily join in an appeal, waiving issuance and service of citation, even after the time for appealing has expired.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(3) That the judgment of the District Court (R. 98) was provisional and contingent, not joint nor unconditional, as to the surety on the admiralty release bond in this *in rem* proceeding, and, hence, the surety was not a necessary party to the appeal.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(c) The statutory provision under which jurisdiction is invoked is *Sec. 240 of Judicial Code*, as amended, *(28 U. S. C. A. 347)*, (Appendix I).

(d) Under the above law we invoke the jurisdiction of this Court on the ground that it is of great public importance to have the highest authority resolve the conflict now existing as to the necessity of sureties upon admiralty stipulations for the release of vessels seized under

process *in rem* being made parties to an appeal from the District Courts. It was held in this case, by the United States Circuit Court of Appeals for the Fifth Circuit, that such sureties are necessary parties to the appeal (R. 487); which is contrary to decisions rendered on the same questions by the Circuit Courts of Appeal of the:

2nd Circuit—*"The Lydia", 1 Fed. (2) 18.*
2nd Circuit—*"The Buckhannon", 299 Fed. 519.*
2nd Circuit—*"The Cartona", 297 Fed. 827.*
2nd Circuit—*"The William Jamison", 67 Fed. (2) 290.*
4th Circuit—*"The Glide", 72 Fed. 202.*
6th Circuit—*"The New York", 104 Fed. 564.*
9th Circuit—*Perrian v. Pacific Co., 133 Fed. 142.*

The 1st, 3rd, 7th, 8th and 10th Circuits apparently have not passed upon this issue.

II.

Statement of the Case.

1. Thomas R. Lombard, as owner of Sand Barge No. 4584, filed a libel *in rem* and *personam* in the United States District Court for the District of the Canal Zone on the 9th day of August, 1930, against the Motorship *"Real"* and Hans Elliot, in a cause civil and maritime for damages for a collision in the waters of the Canal Zone on the 31st day of July, 1930 (R. 3).

2. On the 13th day of August, 1930, Hans Elliot claimed the said Motorship *"Real"* (R. 19) and thereupon entered into a stipulation with the libelant for the release of said Motorship *"Real"* (R. 19).

3. Pursuant to such stipulation, Hans Elliot, your petitioner, executed a "Release Bond" in the sum of $10,000, whereon the United States Fidelity and Guaranty Company signed as surety (R. 20).

4. Trial of the matter was had on the 24th day of July, 1931, the Honorable James J. Lenihan, United States District Judge for the District of the Canal Zone, presiding (R. 62).

5. On the 13th day of August, 1932, Judge Lenihan rendered his opinion and on the 27th day of August, 1932, entered a decree in favor of the libelant, Thomas R. Lombard, and against the claimant, Hans Elliot, awarding the libelant damages in the sum of $6,321.29 (R. 97). By such decree it was:

> *(a)* "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid;",
>
> *(b)* "Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree;"
>
> *(c)* "Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs" (R. 98).

6. On the 10th of September, 1932, and within ten days from service of notice of the entry of the said decree, Hans Elliot, respondent, filed a petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, together with his assignment of errors (R. 99), which petition was allowed (R. 101).

7. The appeal to the United States Circuit Court of Appeals for the Fifth Circuit having been perfected, the appellee, Thomas R. Lombard, did, on the 19th day of April, 1933, file in the United States Circuit Court of Appeals for the Fifth Circuit a "Motion to Dismiss the Appeal" on the grounds that the United States Fidelity and Guaranty Company, surety upon claimant's release bond, had not been made a party to the appeal or that a severance had not been made (R. 477).

8. Thereafter, on April 22, 1933, the United States Fidelity and Guaranty Company, the surety on the release bond above mentioned, voluntarily appeared in the United States Circuit Court of Appeals for the Fifth Circuit and moved for leave to join with the appellant, Hans Elliot, in prosecuting the appeal, expressly waiving issuance and service of citation (R. 480). At the same time, Hans Elliot moved for leave to amend his appeal to include the surety company as a party appellant (R. 478).

9. On the 4th day of August, 1933, the said United States Circuit Court of Appeals for the Fifth Circuit entered a decree dismissing the appeal on the grounds that the failure of the surety on release bond to be made a party

to the appeal was fatal and required dismissal (R. 491); (opinion R. 484). From such holding Judge Samuel H. Sibley dissented and rendered a separate opinion (R. 488).

10. As additional grounds the Circuit Court of Appeals, Fifth Circuit, held: that in this admiralty appeal the surety upon the bond for release of the vessel seized by process *in rem*, who had not been made party to the appeal, cannot, after the time has expired for perfecting the appeal, be made party of record, even by appearing voluntarily, as the judgment entered by the District Court in the matter at bar was, from the time of its rendition, not provisional, but joint and final against the surety equally as against Hans Elliot, the principal.

11. Thereafter this Honorable Court on the petition of Hans Elliot and the United States Fidelity and Guaranty Company, appellants below, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, for which the reasons relied on were:

> *(A)* The decision of said Circuit Court of Appeals, Fifth Circuit, as to the necessity of sureties upon an admiralty stipulation being made parties to an appeal is in conflict with the decision of the Circuit Courts of Appeal for the Second, Fourth, Sixth and Ninth Circuits, on the same matter, in the cases of *The Lydia, 1 Fed. (2) 18* (C. C. A. 2nd Cir.); *The Buckhannon, 299 Fed. 519* (C. C. A. 2nd Cir.); *The Cartona, 297 Fed. 827* (C. C. A. 2nd Cir.); *The William Jamison, 67 Fed. (2) 290* (C. C. A. 2nd Cir.); *The Glide, 72 Fed. 200* (C. C. A. 4th Cir.); *The New York, 104 Fed. 561* (C. C. A. 6th Cir.); and *Perrian v. Pacific Coast Company,*

133 Fed. 140 (C. C. A. 9th Cir.), and is a decision of an important question of general law.

(B) The decision of the Circuit Court of Appeals, Fifth Circuit, denying the right of a surety to join voluntarily in an appeal prior to hearing in such court is in conflict with the weight of authority.

(C) The decision of the Circuit Court of Appeals, Fifth Circuit, holding that the decree entered by the District Court was as joint and effective against the surety at the date of its entry, as it was against the claimant is an erroneous decision of an important question of general law.

Consequently this case is now presented to this Honorable Court for its review of the issues propounded in the petition for the writ of certiorari.

III.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the United States Fidelity and Guaranty Company was a necessary party to the appeal. (R. 486-487).

2. The Circuit Court of Appeals erred in refusing to allow the United States Fidelity and Guaranty Company to be made a party appellant upon its voluntary appearance in the Appellate Court, waiving the issuance and service of citation. (R. 487).

3. The Circuit Court of Appeals erred in holding that the decree entered by the District Court was joint and effective against the surety as of the date of its entry as it was against the appellant, Hans Elliot. (R. 487).

IV.

ARGUMENT.

Summary of Argument.

Point A. We propose in Point A to discuss the conflicts existing between other circuits and authorities and the Fifth Circuit as to the necessity of sureties upon an admiralty release bond being made parties to an appeal.

Point B. We propose in Point B to discuss the right of a surety to join voluntarily in an appeal even after the time for perfecting an appeal has expired.

Point C. We propose in Point C to discuss the effect of a decree such as was entered by the District Court in the instant matter, with special emphasis on its effect upon a surety prior to the time when by its terms such decree operates against a surety.

Point A.

Conflicts.—The Fifth Circuit Court of Appeals in the instant matter dismissed the appeal of Hans Elliot for the reason that the surety, United States Fidelity and Guaranty Company, was not made a party to the appeal, was not asked to join in the appeal, and there had been no summons or severance.

The court itself, speaking of the motion to dismiss, says:

> "On questions presented by the above motions the decisions are not harmonious, particularly with

regard to admiralty stipulations for the release of vessels:" (R. 482).486

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> "All parties against whom a decree is rendered should join in the appeal, or the record should show that those who have not joined have had notice of the taking of the appeal and have either refused or neglected to joint. But sureties on a stipulation are not parties and need not join."

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> "It being settled law that an admiralty appeal brings up the whole case *de novo*, vacating thereby the decree below, it is unnecessary that any but one party or claimant take an appeal, which operates for all, so that non-appearing parties are no longer bound by the decree below."

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> "Sureties appearing on the record may appeal, but they are not necessary parties to an appeal by a party to the record, unless some extraneous question arises involving their obligation on their bond or stipulation."

The Fifth Circuit stands alone in its ruling that the sureties upon a stipulation for the release of a vessel are necessary parties to an appeal.

> "Sureties on a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, filed his claim to her, and thence forward becomes a party to the record, and conducts and controls the

defense. * * * But sureties in the stipulation do not become parties." *The Glide, 72 Fed. 202* (C. C. A. 4).

"Such a bond is not a mere personal security given to the plaintiff, but security given to the court. It is a pledge or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. Unless some extraneous question arises involving the scope or obligation of the sureties in such bond, they are not necessary parties to an appeal taken by any of the parties to the record." *The New York, 104 Fed. 564* (C. C. A. 6).

"Sureties to such a stipulation are not parties to the controversy. The claimant alone conducts and controls the defense." *Perrian v. Pacific Coast Co., 133 Fed. 142* (C. C. A. 9).

"The appearance of the stipulator as an intervenor cannot be recognized. The only difference in this regard between this case and that of *Paulsen v. The Cartona, 297 Fed. 827* (C. C. A. 2), is that the stipulator himself was permitted to intervene in this cause, instead of those who had given cross-security to the stipulator. It is just as true in this instance as it was in that of the case cited that the stipulator had no interest in the *res*, and therefore cannot be permitted to appear as an intervenor." *The Buckhannon, 299 Fed. 519*, at *p. 520* (C. C. A. 2); *The Lydia, 1 Fed. (2) 18* (C. C. A. 2).

In "*The William A. Jamison*," *67 Fed. (2) 290* (C. C. A. 2) the Court said at *page 291:*

"But, in admiralty causes, while recognizing the authority of the rule (Estis v. Trabue, supra), it has been held that stipulators for value were not necessary parties on appeal, even though severance

was not obtained. The Lydia, 1 F. (2d) 18 (C. C. A. 2); Perriam v. Pacific Coast Co., 133 F. 140 (C. C. A. 9); The New York, 104 F. 561 (C. C. A. 6); The Glide, 72 F. 200 (C. C. A. 4).

These cases recognize the admiralty practice that a stipulator for value has no right to conduct the claimant's case and merely substitutes a bond as a *res* in place of the vessel released, as required by Revised Statutes, § 941 (28 USCA § 754)."

The opinion of the Circuit Court of Appeals, Fifth Circuit, in this case indicates its belief that it was constrained to so hold by *Hartford v. Bunn, 285 U. S. 169, 52 S. C. 354, 76 L. Ed. 685.* We submit that this Court did not, in the *Hartford* case, hold that a surety is **always** a necessary party to an appeal from a judgment that would be final but for the appeal; the holding was expressly restricted to those occasions where the judgment involved is joint on its face; it cited the following cases where the judgments **were joint**:

Norfolk & S. Trp. Co. v. Virginia, 225 U. S. 264, 32 S. Ct. 828, 56 L. Ed. 1082; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Estis v. Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437; Mason v. U. S., 136 U. S. 581, 10 S. Ct. 1062, 34 L. Ed. 545; Hardee v. Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. Ed. 933.

For rulings of this Court subsequent to *Hartford v. Bunn, supra,* expressly recognizing that restriction of the applicability of that decision to joint judgments, see memorandum cases: *Capital National Bank v. Sup. Hinds Cty., 286 U. S. 550, 52 S. Ct. 504, 76 L. Ed. 1286; Fidelity Union*

Cas. Co. v. Hanson, 287 U. S. 599, 53 S. Ct. 12, 77 L. Ed. 522; Wagner Tug Boat Co. v. Meagher, 287 U. S. 657, 53 S. Ct. 120, 77 L. Ed. 567; Missouri State Life Ins. Co. v. Johnson, 288 U. S. 609, 53 S. Ct. 404, 77 L. Ed. 984.

Therefore, where the judgment is contingent, not joint, the rule in *Hartford v. Bunn* is necessarily inapplicable. *"The William A. Jamison", 67 Fed. (2d) 290, supra* (C. C. A. 2).

In the case of *The Lydia, 1 Fed. (2) 18, p. 21* (C. C. A. 2), where a judgment in form similar to the one at bar was entered, the court denied the right of the stipulator to become a party by appealing from the decree below.

Point B.

The Appellate Court refused to allow the United States Fidelity and Guaranty Company to be made a party to the appeal upon its voluntary appearance before the hearing, expressly waiving issuance and service of citation, and denied the motion of Hans Elliot to amend his appeal so as to make the United States Fidelity and Guaranty Company a party to the appeal.

Such an amendment was allowed by this Honorable Court, without opinion, in the cases of *Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 34 L. Ed. 539;* also in *Knickerbocker Life Insurance Company v. Pendleton, 112 U. S. 696,* at *page 710, 28 L. Ed. 866.*

The C. C. A., Fourth Circuit, has also held:

"It would appear to be settled that this court, under the provisions of Sec. 1005, Rev. St. U. S.,

28 U. S. C. A. 873 (Appendix II) above mentioned, has the power to allow an amendment such as the one moved for in this case, although thereby an additional party is inserted in the writ of error and the citation, and although at the time the amendment is allowed the period within which the writ of error should have been sued out from the original judgment has elapsed." *Gilbert v. Hopkins* (C. C. A. 4), *198 Fed. 849*, at *page 850*.

A similar motion to amend by adding a co-defendant in error was granted and motion to dismiss denied without discussion in *Rininger v. Puget Sound Electric Ry.* (C. C. A. 9), *220 Fed. 419*.

Similar motions were granted by the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca, 250 Fed. 19*, and *The Mary B. Curtis, 250 Fed. 9*, and by the Circuit Court of Appeals for the Fourth Circuit in *Browning v. Boswell, 209 Fed. 788* (C. C. A. 4), in which case the court said, after holding it had discretionary power to make the order for amendment, at *page 791:*

> "It is equally clear that in the present instance the discretion ought to be exercised and the motion granted. There has been no lack of diligence, but at most a misapprehension by counsel as to a question of practice, and the motion is made to meet the objection urged by the appellees that the appeal can not be prosecuted without citation of the creditors. The appellees will not be delayed or otherwise prejudiced and the bringing in of the creditors as parties to the appeal by issuing the citation to them will have the good effect of entirely eliminating from the record a serious technical question, and leaving the case to be decided on its merits."

Point C.

The Circuit Court held the judgment rendered in the District Court to be joint.

As said by Judge Samuel H. Sibley in his dissenting opinion in this case (R. ~~494-495~~ 489-490):

> "To me this decree seems on its face **evidently not joint,** but that the only effective parts of it are against Elliot alone, the respondent below. There are three distinct judgments in separate paragraphs. The first is: 'Ordered, adjudged and decreed that the libellant do have and recover of the respondent' certain sums. This is the decree in the original cause. The surety, United States Fidelity & Guaranty Company, is not mentioned in it. The second is: 'It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and United States Fidelity and Guaranty Company, his stipulators * * * to satisfy this decree.' This is the summary judgment on the stipulation which by the provision of 28 U. S. C. A., Sec. 754, 'may be recovered at the time of rendering the decree in the original cause.' It is not the same thing as the decree in the original cause, though often included in it, but is an additional judgment on the stipulation, gotten against the parties to it without additional proceedings therefor. The third judgment is: 'Ordered, adjudged and decreed that the cross-bill be dismissed.' United States Fidelity & Guaranty Company is a party to the second of these judgments only, and that judgment is but provisional. For it to be made operative there must be proof of service of a notice on the respondent or his proctors of the rendition of the first judgment and proof of the lapse of ten days thereafter without payment or

appeal, consideration of which would perhaps require further judicial action. But in fact there was an appeal within ten days, so that by its own terms this judgment never became operative. There was nothing for the United States Fidelity & Guaranty Company to appeal from. It was not, however, discharged from its stipulation, for if its condition be looked to it shows an obligation to 'pay the money awarded by the final decree rendered by the court of the appellate court if any appeal intervenes.' A summary judgment can be entered on the stipulation so soon as a truly final decree in the case is had, although rendered on a mandate from this court. A joint decree might have been made on the trial below, but it was not."

"The condition of the appeal bond is that the appellants shall pay the damages and costs which shall be awarded against them by this court, as appellants, if they shall fail to make their appeal good. The appellants are not under obligation to pay the sum awarded against them by the decree until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree. The obligations of the sureties being an obligation only that the appellants shall pay when obliged to pay, cannot be enforced against them in any manner, even to the extent of entry of judgment against them, until the obligations of the appellants to pay comes into force; and such obligation of the appellants does not, in a case like the present, where the appeal may be a supersedeas, come into force until the expiration of ten days after the rendering of the decree." The New Orleans, 18 Fed. Cas. No. 10,181, 17 Blatchford 216.

In reaching a conclusion whether or not the judgment now under consideration is provisional or joint, this Court cannot, as it said in *Hartford v. Bunn*, *supra*, "un-

dertake to explore the record"; the face of the judgment must afford the sole indication of its effect. The majority opinion of the Circuit Court of Appeals, Fifth Circuit, while seemingly relying on *Hartford v. Bunn, supra*, does not deny that the judgment of the District Court herein was contingent upon its face, but reasons (R. 487) "whether a judgment is joint depends on substance rather than form" and then proceeds to *explore the record*—which method of mental approach was expressly disapproved in *Hartford v. Bunn, supra.*

Hartford v. Bunn is distinguishable on two additional grounds: The action there was at law; and the appellant and surety had previously obtained the full benefit of an appeal to the Supreme Court of Mississippi, in which Court the judgment (reviewed by this Court) was *joint in form and final as to both parties*; while the Court that dismissed the appeal here at issue was the appellate court of the first instance, and ***"the law favors appeals"***.

Since the application for the writ was filed in this Court our contentions that the judgment of the District Court is not joint and that *Hartford v. Bunn* is not controlling, was expressly upheld by the Circuit Court of Appeals for the Second Circuit in *"The William A. Jamison", 67 Fed. (2d) 290;* that case involved identical issues, for the judgment there reviewed was, for all practical purposes, identical in wording with the judgment now at issue. The Court said therein at *page 292:*

> "We need not say now whether we should look beyond the form of the judgment for here the obligation as the judgment records is joint and several, and this distinguishes the instant case from

the Hartford Co. case. It permits us to act in conformity with our rules and our previous decisions in holding that the stipulator is not a necessary party to the appeal in this admiralty cause and that he has no interest in the *res*. The Lydia, 1 F. (2d) 18 (C. C. A. 2); The Buckhannon, 299 F. 519 (C. C. A. 2).

The motion to dismiss is therefore denied."

Conclusion.

It is, therefore, respectfully submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and this cause be remanded with instructions that the appeal be there reinstated for further proceedings not inconsistent with the rulings of this Court.

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APPENDIX I.

28 U. S. C. A. 347. (Judicial Code, Section 240, amended). Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. *(a)* In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise

than as provided in this section. (Mar. 3, 1891, c. 517, Section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Section 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938).

APPENDIX II.

28 U. S. C. A. 873. Amendment of writ of error. The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error (R. S. Section 1005).

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF FOR THOMAS R. LOMBARD.

PURNELL M. MILNER,
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Counsel for Thomas R. Lombard,
Libellant and Respondent in Writ.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O. La.

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Statement of Case.

This is an action *in rem* and *personam* by Thomas R. Lombard, owner of a sand barge, for its sinking, due to collision with the motor-ship "Real", owned and claimed by Hans Elliot in the navigable waters of the Canal Zone July 31st, 1930, claiming $14,438.00 loss of said barge and machinery. Being a non-resident and the value of the motor-ship "Real" being alleged less than $5,000.00, an

attachment against certain monies was also granted. (Tr. 3-10).

A stipulation for costs in the sum of $250.00 was filed by claimant, Hans Elliot, owner of the motor-ship "Real", with the United States Fidelity & Guaranty Company, as surety, conditioned "that they, and each of them shall pay all costs and expenses which shall be awarded against the said M/V Real, her engines, boat, boilers, tackle, apparel, furniture, etc., and Hans Elliot and for the stipulator undersigned or any of them by decree of this Court, and in case of appeal by any Appellate Court."

Thereupon, Hans Elliot, owner, claimed the M/V Real (Tr. 19).

The United States Fidelity & Guaranty Company signed the Release Bond (Tr. 20-21) in the sum of Ten Thousand Dollars, with the following condition:

> "Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Vansiclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.
>
> H. Elliot
> Hans Elliot
> W. Y. Boyd, Attorney for the United States Fidelity and Guaranty Company."

A cross-libel was filed by Hans Elliot (Tr. 39) and a stipulation for costs with United States Fidelity and Guaranty Company, in the sum of $250.00 as surety, conditioned "to pay all costs and expenses which shall be awarded against the said libellant and/or the stipulator undersigned or any one of them by decree of this court and in case of appeal by any Appellate Court." (Tr. 38-39).

This cause proceeded to trial on the libel and cross libel July 24, 1931. (Tr. p. 62, *et seq.*).

On August 13, 1932 (Tr. 70-85) the Court, after due trial and being fully advised, filed its Findings of Fact, Conclusions of Law and Opinion.

The following decree was filed:

(a) "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 5% per annum from the 31st day of July, 1930, together with the libelant's costs, taxed in the sum of $117.20, with interest thereon until paid; and it is further

(b) Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity & Guaranty Co., his stipulators for costs and value, their goods, chattels, and lands to satisfy this decree; and it is further

(c) Ordered, adjudged and decreed that the cross libel herein be dismissed at cross libellant's costs."

Done at Ancon, C. Z., this 27th day of August, 1932.

(signed) James J. Lenihan
District Judge.

We mark the three divisions in conformity with petitioner's analysis (a), (b) and (c) so we may refer to each order in that way.

Copy of decree was acknowledged served Aug. 31, 1932 by Proctors for respondent and cross-libellant (Tr. p. 99).

On September 10, 1932, Hans Elliot, claimant and cross libellant, filed his petition of appeal, but did not pray for a supersedeas (Tr. 99-101).

It appears that the order of appeal, which appears at Tr. p. 101, was signed in Chambers, September 10, 1932. This is shown by reference to "Minutes of September 10, 1932," which appear copied at Tr. p. 108, viz:

"Minutes of September 10, 1932.

"The petition of Hans Elliot, claimant and cross libellant, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and his assignment of errors having been filed this 10th day of September, 1932, and said appeal having been allowed *in chambers* this day,

It is now ordered *in open court* that the supersedeas bond be and is hereby fixed in the sum of $10,000 and that the cost bond on appeal be and is hereby fixed in the sum of $250.00." (Tr. p. 108).

September 10, was last day for appeal.

A cash deposit of $250.00 was made in lieu of the cost bond. (Tr. p. 111).

Thereupon the transcript was filed in the United States Circuit Court of Appeals, Fifth Circuit.

Whereupon, appellee on April 19, 1933, filed a motion to dismiss the appeal upon the grounds (Tr. 477-478):

"I.

This Court is without jurisdiction to entertain this appeal because the necessary parties to give the Court jurisdiction are not made parties to the appeal.

II.

It appears from the transcript of record, P. 20-21, that the United States Fidelity & Guaranty Company corporate surety doing business in the Canal Zone, became the stipulators and sureties on the release bond of the appellant in the penalty of $10,000 on the 13th day of August, 1930.

It further appears from the transcript, P. 98, that the decree was filed herein August 27, 1932 in favor of libellant and against respondent for the sum of $6,321.29 with interest thereon at the rate of 6% per annum from the 31st day of July, 1930 together with libellant's costs, taxed in the sum of $117.20 with interest thereon until paid.

It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon respondent or his proctor, execution issue against Hans Elliot, respondent and the United States Fidelity & Guaranty Company, his stipulators, for costs and value, their chattels and lands to satisfy this decree.

III.

The record fails to show that the United States Fidelity & Guaranty Company were made a party to the appeal; it does not appear that the surety company was asked to join in the appeal and the record fails to show that there has been any summons or severance issued herein.

IV.

The record fails to show any return day for the appeal. Wherefore, appellee prays that an appropriate order be entered by this Honorable Court, dismissing said appeal.

(Signed) Carlos Icaza, A. and L. S. Carrington, P. M. Milner, Proctors for Libellant and Appellee."

"Thereafter, on April 22, 1933, Hans Elliot, appellant, filed a motion for leave to amend the petition for appeal (Tr. p. 99) to show that the United States Fidelity & Guaranty Company joins the said Hans Elliot as a party appellant (Tr. 478-479). On the same day, April 22, 1933, in the Circuit Court of Appeals, Fifth Circuit, came the United States Fidelity & Guaranty Company waiving issuance and service of citation and filed a motion to join Hans Elliot, appellant. (Tr. 480-481).

To both of these motions, Thomas R. Lombard filed his exceptions (Tr. 482-483) that the motions came too late. That under Section 1005 of the Revised Statutes, being Sec. 3 of Act of June 1, 1872, Chapter 255, 17 Stat. at Large, no provision was made by which sureties upon a forthcoming bond, not having been made parties or (notice printed record erroneously uses word "are") joined in the appeal, and where no summons or severance was allowed, could be allowed in the Appellate Court.

The United States Circuit Court of Appeal dismissed the appeal (Tr. 484-490).

The majority opinion held:

1. That the judgment of the District Court was final and joint and the United States Fidelity and Guaranty Company, surety on the Release Bond, was a necessary party.

2. That "whether a judgment is joint depends on substance rather than form. The test is whether the same relief is granted against all parties." (Tr. 487).

   (On the question of substance rather than form we cite *Hanrick v. Patrick, 119 U. S. 156; Love v. Export Co., 143 Fed. 1, 11; Clarke v. Boysen, 39 F. [2nd] 800-821*).

It cited the case of *Hartford Accident & Indemnity Company v. Bunn, 285 U. S. 169*, as governing the decision in this case as follows (Tr. p. 486):

> "However, in the recent case of Hartford Accident v. Bunn, 285 U. S. 169, where a joint judgment was rendered by the Supreme Court of Mississippi against appellant—and the surety on the appeal bond, it was held, after an extensive review of the authorities, that the surety was an indispensable party to a writ of error to the Supreme Court, and a motion to join the appeal, made after the time for appeal, came too late and could not be entertained. In that case the decision in The New York, 104 Fed. 561, which is typical of that line of cases, was expressly disapproved."

It may not be out of place to say right here that the honorable dissenting judge likewise agrees that if the

judgment appealed from is "joint", the case of *Hartford Accident Co. v. Bunn, 285 U. S. 169*, "is controlling authority in the case at bar. That case settled that United States Fidelity & Guaranty Company cannot be made a co-appellant now, after the time for appeal has expired, if it should have joined in the appeal originally."

The application for the writ of certiorari is based upon an alleged:

1. Lack of harmony in decisions of Circuit Courts of Appeal, upon the question whether a surety on a Release Bond in Admiralty, whose obligation is governed by statute, and in this case, as follows:

> "Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and *upon notice of such order* or decree to Vansiclen and Boggs, Esquires, Proctors for the claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue."

is a necessary party to the appeal.

It would seem to us that we are not concerned with conflicting decisions on this point in Circuit Courts of Appeal. This is the settled practice of the Fifth Circuit Court of Appeals. The Bylands, *231 Fed. 101*, certiorari denied, *241 U. S. 679*. We are only concerned as to what this Honorable Court has decided.

So, we have the majority opinion holding the judgment is final and joint and the surety on Release Bond a necessary party, and the minority opinion holding the decree is not joint and the United States Fidelity and Guaranty Company is not a necessary party. It seems to us, therefore, the only point to be decided in this case by this Court is whether the judgment is final and joint.

ARGUMENT.

It seems abundantly clear to us that the dissenting opinion is illogical and unsound.

First, there are only two actions, a libel and cross-libel—as the libellant won there were or could be only two parts of the judgment; one in favor of libellant and one against claimant and cross-libellant.

This is exactly similar to our Civil Law practice where there is a reconventional demand. There is a judgment in favor of plaintiff against defendant, and a judgment dismissing the reconventional demand.

Therefore, there *were not three distinct judgments*, nor could there be, as the learned dissenting Judge suggests. (Tr. 489).

Using the description of petitioners, for the so-called three parts of the judgment, (a), (b) and (c), we say (a) and (b) naturally are but one judgment. In other words, unless (a) and (b) read together were but one decree

against both respondent claimant and his surety, *execution* could not issue at any time against the surety on the Release Bond *without another judgment.* A joint judgment or decree is a matter of *substance*, not form. *Hanrick v. Patrick, 119 U. S. 156; Love v. Export Co., 143 Fed. 1, 11; Clarke v. Boysen, 39 F. (2nd) 800-821.* The decree is but one decree resolved in two parts, one in favor of libellant and, secondly, dismissing cross libel.

This leaves the decree in favor of libellant as follows:

(a) "Ordered, adjudged and decreed, that the libellant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with libellant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Company, his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

(b) Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libellant's costs."

The decree in this case leaves nothing to be done—*in futuro* to make the judgment *final and executory* against the United States Fidelity & Guaranty Company, but *in praesenti* awards judgment in favor of libellant and states

that unless decree be satisfied or an appeal taken, execution, after notice, shall issue against respondent, Hans Elliot, and the United States Fidelity & Guaranty Company, his stipulators, for costs and value, their goods, chattels and lands to *satisfy this decree.*

Considering a judgment or decree as a matter of substance and intention, as your Honors hold, this decree must be declared a *joint decree.*

The decree in *Ex parte Sawyer, 88 U. S. 618*, quoting Justice Waite, after giving judgment against appellant, is:

> "And it is further ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time prescribed by law, a summary judgment therefor be entered in favor of the said libellant, appellees, and against James Lee, Jr., and J. Wade Davis, sureties on said appeal, in the sum of $10,000, the amount of their stipulation by them given on said appeal, and that said appellees have execution therefor to satisfy said decree."

Is it not clear that the decree in that case appealed from is neither final nor joint against the sureties?

It requires *ipsissimis verbis* (first) if no appeal is taken a judgment *in futuro* to be taken against the sureties, and (second) that on the *judgment so to be taken in the future execution issue.*

By no species of mental gymnastics can the decree in this Hans Elliot case be likened to the decree in *Ex parte Sawyer.*

Our citation of *Ex parte Sawyer* was merely to show the absolute dissimilarity.

We think the learned dissenting Judge has fallen into another error. He says (Tr. 489) for the purpose of making the decree which we obtained executory, as follows:

> "For it to be made operative there must be proof of service of a notice on the respondent or his proctor of the rendition of the first judgment, and *proof* of the lapse of ten days thereafter without payment or appeal, consideration of which would perhaps require further judicial action." (Italics ours).

This, in our opinion as a practicing lawyer, is entirely incorrect. The judgment or decree granted in favor of Thomas R. Lombard against Hans Elliot and under consideration now of this Court, does not require anything, after the elapse of ten days, but a *fieri facias*, which issues as a matter of right and at the request of libellant's proctor. The libellant's proctor does not have to appear in court and present any proof at that time and obtain another judgment of execution herein. The judgment or decree rendered is conclusive and final. If the writ of execution issue, it remains for the respondent or defendant to defend the writ of execution by asserting and proving that the ten days have not elapsed or that an appeal has been taken, and therefore have the writ of *fieri facias* dismissed.

This is, as clearly can be seen, something required of the respondent or defendant. There is nothing more required of a judicial nature of the libellant.

Again we respectfully say that the honorable dissenting Judge has fallen into error by overlooking a most important fact. He says (Tr. 489):

> "But in fact there was an appeal within ten days, so that by its own terms this judgment never became *operative*."

We respectfully urge that the learned Judge is erroneously following the expression used in *Ex parte Sawyer, 88 U. S. 618*, as follows:

> "But the sureties occupy a different position. No decree was entered against them before the appeal. The order was that a judgment be entered if an appeal was not taken. The appeal was taken, and therefore this order never became operative."

The learned dissenting Judge has, we respectfully submit, overlooked something of compelling importance, and it is this:

From this viewpoint, the judgment is not *final* for *execution against the stipulators*, but he has overlooked the record.

1st. There is the Release Bond with the stipulation and condition above quoted (Tr. pp. 20-21).

2nd. He has overlooked the record as to the appeal. At transcript, p. 108, we note:

> "Minutes of September 10, 1932."
>
> "The petition of Hans Elliot, claimant and cross-libellant, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and his assignment of errors having been filed this 10th day

of September, 1932, and said appeal having been allowed in chambers this day,

It is now ordered in open Court that the supersedeas bond be and is hereby fixed in the sum of $10,000, and that the cost bond on appeal be and is hereby fixed in the sum of $250.00."

The $250.00 cost bond was given (Tr. p. 111), but *no supersedeas bond* in penalty of $10,000 was given.

This is established by looking at the transcript.

Now, we urge that when the Court says execution shall issue in ten days if no appeal be taken, it must have referred to what we civil lawyers refer to as a "suspensive" appeal bond, or a supersedeas bond. Manifestly, it did not refer to the $250.00 cost bond, as only a supersedeas bond could *stop execution* against claimant and his surety, the United States Fidelity & Guaranty Company.

If supersedeas had not been asked and supersedeas bond fixed, but no supersedeas bond filed, manifestly execution could issue, as a matter of right, after the lapse of ten days, even if an appeal were taken, upon only a Cost Bond.

And that is just what has occurred. The respondent claimant did not comply with the decree and take an appeal, suspending execution, so the decree against respondent claimant and his stipulator surety, the United States Fidelity & Guaranty Company, is absolutely final and execution may issue as decreed, after September 10, 1932.

We believe we are absolutely correct and logical when we say that the Court when speaking of an "appeal in ten days" must have had in mind an appeal which would stop execution, a supersedeas, because in effect the Judge said execution shall issue unless an appeal (supersedeas) be taken in 10 days after notice.

Service of the Decree had been made 31st of August, appeal taken on last day, Sept. 10, 1932, but respondent filed only $250 Cost Bond but no $10,000 supersedeas bond fixed by order of Court.

The very decree rendered conclusively establishes it is against Hans Elliot and his surety, the United States Fidelity and Guaranty Company.

The power of the Court, if no appeal with supersedeas was taken within ten days, over the surety—the United States Fidelity and Guaranty Company—was at an end and execution could issue.

In other words, expressed simply and directly, unless the stipulator surety, the United States Fidelity and Guaranty Company, took an appeal or joined in such an appeal with supersedeas in ten days, the judgment against it was final and *executory.*

No supersedeas appeal was taken by Hans Elliot within ten days, and no appeal of any kind was taken by the stipulator surety, the United States Fidelity and Guaranty Company.

The judgment is final and executory against Hans Elliot and his stipulator surety on the Release Bond of the

United States Fidelity and Guaranty Company, and we respectfully submit that the Honorable Dissenting Judge of the Court of Appeals was in error when it declared the judgment rendered was not operative and another or summary judgment against the surety on the Release Bond was necessary before execution could issue.

Wherefore we respectfully submit that the decree of the United States Circuit Court of Appeals is correct and should be affirmed.

PURNELL M. MILNER,
CARLOS ICAZA,
A. and L. S. CARRINGTON,
Counsel for Thomas R. Lombard,
Libellant and Respondent in Writ.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THOMAS R. LOMBARD.

PUTNEY M. MILNER,
CARLOS IÇAZA,
A. AND L. S. CARRINGTON,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD.

SUPPLEMENTAL BRIEF FOR THOMAS R. LOMBARD.

MAY IT PLEASE THE COURT:

The Court has graciously allowed us to supplement our argument because our original Brief was written before petitioner's Brief was received.

Petitioner urges the decree in this case is not final as to stipulator's surety because no judgment was rendered against the surety and cites on Page 3 of his Brief:

"2nd Circuit—*The Lydia*, 1 Fed. (2) 18,
" *The Buckhannon*, 229 Fed. 519,
" *The Cartona*, 297 Fed. 827,
" *The William Jamison*, 67 Fed. (2) 290."

And further that the decree is not joint—and hence is not controlled by your Honors' decision in *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169, where your Honors held that the judgment was joint in form and hence the surety on the appeal bond was a necessary party and must join in the appeal, and the time for appeal having lapsed the matter was jurisdictional and the appeal was dismissed.

First, as to the *finality* of the decree;

It is a decree on the merits, after trial for a definite sum of money against respondent claimant, and execution ordered if no appeal be taken within ten days, the statutory time, against Hans Elliot respondent and the United States Fidelity and Guaranty Company, his stipulator for costs and value, their goods, chattels and lands to satisfy this decree. The petitioner seems to endeavor to take advantage of a repetition of the words "ordered, adjudged and decreed" in relation to execution. We earnestly suggest that these words are surplusage, unnecessary. Once "ordered, adjudged and decreed" was amply sufficient and after decreeing liability in principal and taxing costs, "with interest thereon until paid;" the decree (leaving out the repetition of "ordered, adjudged and decreed") could have continued as follows: "and unless this decree be satisfied."

The decree is palpably a "joint" judgment against Hans Elliot and his surety on forthcoming bond because otherwise the order for execution against the stipulator's surety would be futile and meaningless because no execution can issue against any one until there is first a final judgment against him.

We believe this Court will declare this decree to be on its face a joint judgment, as permitted by statute in the original decree, against the United States Fidelity and Guaranty Co., Hans Elliot's stipulator surety. As your

Honors held in *Hartford Accident Co.* v. *Bunn*, 285 U. S. 178, the judgment is joint in form:

> "In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty."

As was said in *Estis* v. *Trabue*, 128 U. S. 225 (229):

> "There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants and *execution is awarded against* all of the parties jointly.
>
> "In such a case, sureties have the right to a writ of error. *Ex parte Sawyer*, 21 Wall. 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such a writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Just a word on the citation of *The Lydia*, 1 Fed. (2) 18, and all cases from the Second Circuit Court of Appeals. The decrees are never ~~joint~~ final because, as stated by Judge Hough, referring to the Supreme Court's ruling in *Re Sawyer*, 21 Wall. 235-240, he said (p. 21): "That decree provided that, unless an appeal be taken, 'a summary judgment' be entered in favor of libellants against the sureties, naming them: *Whereas, under the practice followed here, it is necessary to issue an order to show cause against the sureties,* and *no execution can issue against them until after they have been heard* and such objections as they may make have been overruled. Yet in the *Sawyer* case it was

held that the decree was not final and did not authorize an appeal. As we have power to consider only appeals from final decrees in admiralty it is clear that the Surety Company has no technical standing in this Court."

We respectfully urge in view of the practice in the Second Circuit Court of Appeals, *The Lydia* and other cases are not parallel or in point.

The court also said:

> "In the Fifth Circuit a final decree seems to be in effect a final judgment against the stipulator by name, and it was held that such stipulator was a necessary party on appeal, unless a severance was had." *The Bylands*, 231 Fed. 101, 145 C. C. A. 289.

We respectfully submit that "*The Cartona*," 297 Fed. 87, where indemnitor to surety tried to appeal has no application to this case. Also that "*The William Jamison*," 67 Fed. (2) 290, was a case of joint and several liability. The suggestion is made that because a stipulator's surety has no control over the case or its trial, that, therefore, he has not the right of appeal. Manifestly this is true only up to the point that he is, under the practice, condemned or a joint decree entered against his stipulator and self. From and after that point he is entitled to appeal under the well recognized and elementary law, so ably stated by Judge Hough in "*The Lydia*," 1 Fed. (2) 21, as follows:

> "It is almost elementary that any one upon whom a *judgment or decree directly, immediately,* and *necessarily operates* may appeal from it so far as it effects himself. Thus it has been held that 'sureties on the stipulation (for value) are entitled to appeal from any decree that may be rendered against them." *Ex parte Sawyer*, 21 Wall. 235.

It has been held differently as to surety for costs.

In *Davis* v. *Preston*, 280 U. S. 406 held: A surety not interested in the controversy on the merits cannot appeal

though included in the judgment. In that case the surety was only surety for costs, not value.

In the present case, the stipulation of surety is for value. And in our Civil Law Practice even a third person interested and directly affected may appeal from any judgment.

Finally, petitioners by leave of court have introduced the Rules of the Fifth Circuit Court of Appeals on subject of supersedeas.

It is to be noted that as appears at Trans. p. 108 the court having granted the appeal (our original brief p. 14) in chambers, did in *open* court say: "It is now ordered in open court that the supersedeas bond be and is hereby fixed in the sum of $10,000, and that the cost bond on appeal be and is hereby fixed in the sum of $250.00."

Petitioner's counsel cites (for what purpose we do not know) Rule XIII, reading "or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and just damages for delay, and costs and interest on appeal."

The supersedeas bond for $10,000 having been fixed in open court without objection of respondent, it must be presumed it was satisfactory to him; otherwise he would have moved to reduce it, which he did not do. He failed to furnish any supersedeas bond.

If his offer is in the nature of any objection to the amount of bond at this time, it is manifestly entirely too late.

Respectfully submitted,

PURNELL M. MILNER,
CARLOS ICAZA,
L. S. CARRINGTON,
Counsel for Thomas R. Lombard.

(4690-C)

SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1933.

Hans Elliot and United States Fidelity and Guaranty Company, Petitioners, *vs.* Thomas R. Lombard.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 9, 1934.]

Mr. Justice Van Devanter delivered the opinion of the Court.

Respondent Lombard, owner of motor ship "Lucky Girl" and a sand barge, presented to the District Court, Canal Zone, a libel in rem against the "Real" and in personam against her owner, Elliot, to recover damages resulting from a collision between those vessels—July, 1930. The "Real" was seized under admiralty process; her owner claimed and secured her release under a stipulation, whereon the United States Fidelity & Guaranty Company was surety, which contained the following clause.

"Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Van Siclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void otherwise to remain in full force and virtue."

The stipulation also contained the further clause—

"and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or their surety, execution for the above amount may issue against their goods, chattels and lands."

Elliot filed an answer, also a cross libel against the "Lucky Girl".

After a hearing in open court, Lombard prevailed and had a decree—August 27, 1932, the presently important portions of which follow—

"Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further

"Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliott, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

"Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs."

Notice of the entry of this decree was duly made on the proctor August 31, 1932.

September 10, 1932, Elliot alone, without notice to the surety or severance, secured an appeal to the Circuit Court of Appeals, Fifth Circuit. In April, 1933, Lombard moved to dismiss the appeal upon the grounds that the decree was against the claimant Elliot and the surety jointly, that the surety was a necessary party to the appeal but had not been made such, and that the period limited therefor had expired. By way of avoiding that motion the surety then asked to join with Elliot in the prosecution of the appeal and Elliot moved for leave to amend so as to include the surety as party appellant.

The Circuit Court of Appeals regarded the matter thus presented as of uncertain solution but concluded, with some division in opinion, that the decree was joint and in that view regarded our decision in *Hartford Accident and Indemnity Company* v. *Bunn*, 285 U. S. 169, as controlling, and accordingly dismissed the appeal. The case so relied upon was a suit in equity which was brought to this Court on appeal from the Supreme Court of Mississippi which had awarded a joint judgment for the payment of money against a litigant and his surety. We there said (pp. 178, 182):

"The judgment is joint in form and no reason appears why either or both of the parties defendant therein might not have appealed to this Court and submitted claims of error for our de-

termination. In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty."

"We cannot undertake to explore the record to ascertain what issues were relied upon in courts below. So to do would lead to uncertainty and unfortunate confusion. We must accept the terms of the judgment as entered. As pointed out above, this is the approved practice when it becomes necessary to determine whether a judgment is final or to what court a writ of error should run. Like reasons apply and control here."

If the decree in the present admiralty suit were joint, as the judgment in that equity suit was, we should regard the rule there announced and applied as controlling here. But we think the decree in the present suit is not joint within the spirit of that rule. The release stipulation was given by the claimant Elliot under 28 U. S. C. § 754 (Rev. Stat. Sec. 941), and Admiralty Rules 5, 6, 11 and 12 (254 U. S. Appendix), and its purpose was to secure the release to him of the vessel then held under admiralty process. Under the statute and the admiralty rules the stipulation was thereby substituted for the vessel and the latter was released. Had the vessel not been released execution on the decree subsequently rendered would have run against the vessel. By the terms of the stipulation the claimant and his surety consented and agreed that the execution might run against their goods, chattels and lands, instead of against the vessel.

The decree which was rendered is in three parts. By the first the libelant is awarded a recovery of damages in a stated sum, with interest and costs, against the claimant, there called respondent; by the second execution is awarded against the claimant and his surety "unless this decree be satisfied or an appeal taken within ten days after service of a copy"; and by the third the claimant's cross-libel is dismissed.

The decree is in a form long recognized as admissible in such an admiralty proceeding. The principal part—that which awards a recovery in damages for the collision—is directed only against the claimant Elliot, not against him and the surety. The only mention of the surety is in the dependent and contingent part relating to the issue of execution, and this part of the decree is based

upon provisions in Admiralty Rules 5, 12 and 20, under which, where a release stipulation is given and the libelant obtains a decree for the payment of money, summary process of execution may be issued against the principal and sureties for the purpose of enforcing the decree.

We think the decree is to be read in connection with the applicable statute and admiralty rules and that when so read it is not joint. That it might have been made joint is not of present importance. There was no requirement that it be so made, and in fact it was not so made. So, giving effect to the face of the record, as the rule in the *Bunn* case requires, we are of opinion that the Circuit Court of Appeals erred in holding that the claimant's appeal, without the surety joining therein, could not be entertained. The decree of that court is accordingly reversed, and the cause is remanded to it for consideration and disposal on the merits.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.